Supreme Court, U.S.
FILED

011495 APR 10 2002

OFFICE OF THE CLERK

No. 01-

IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 2001

JORDAN HOSPITAL, INC.
Petitioner,

v.

DONNA E. SHALALA, in her capacity as Secretary
of the Department of Health and Human Services,
NANCY-ANN MIN DEPARLE, in her capacity as Administrator
of the Health Care Financial Administration, and
the MEDICARE GEOGRAPHIC CLASSIFICATION REVIEW BOARD
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

Bruce A. Singal
DONOGHUE, BARRETT & SINGAL, P.C.
One Beacon Street
Boston, MA 02108
(617) 720-5090

Counsel for Petitioner

2588

QUESTIONS PRESENTED

Jordan Hospital, Inc. ("Jordan") is a participating provider in the Medicare program. The Health Care Financing Administration ("HCFA") failed to gather and publish accurate provider data, which resulted in Jordan's not being able to take advantage of a statutory right to apply for "geographic classification" in fiscal year 2000. The questions presented are:

1. Whether the court of appeals erred in concluding that the district court lacked subject matter jurisdiction where the Complaint alleged a constitutional challenge to the respondents' regulations and procedures.

2. Whether the court of appeals erred in affirming the district court's granting of the motion to dismiss on the grounds that the relief requested by Jordan fell within the statutory ban on judicial review of decisions contained in 42 U.S.C. § 1395ww(d)(10)(C)(iii)(II), where the Complaint constituted a challenge to the validity of the respondents' regulations and procedures rather than a challenge to a particular agency decision.

3. Whether the court of appeals erred in affirming the district court's granting of the motion to dismiss when the district court had subject matter jurisdiction over Jordan's Complaint because respondents may be sued for violating their own rules, regulations, practices and procedures, particularly when such violations resulted in substantial prejudice to Jordan and were properly subject to equitable tolling.

4. Whether the court of appeals erred in affirming the district court's dismissal of the Complaint for lack of subject matter jurisdiction on the grounds that the statutory ban on judicial review of decisions contained in 42 U.S.C. § 1395ww(d)(10)(C)(iii)(II) deprived the court of subject matter jurisdiction where respondents' refusal to consider the application of Jordan for geographic reclassification was not a decision on the merits for which judicial review was foreclosed.

PARTIES TO THE PROCEEDINGS

The Petitioner, Jordan Hospital, Inc., was a plaintiff in the district court and an appellant in the First Circuit Court of Appeals, along with defendants-appellees Donna E. Shalala, in her capacity as Secretary of the Department of Health and Human Services, Nancy-Ann Min Deparle, in her capacity as Administrator of the Health Care Financing Administration, and the Medicare Geographic Classification Review Board.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Supreme Court of the United States of America, Appellant Jordan Hospital, Inc. states that it has no parent corporations and no publicly held company owns ten percent or more of its stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
RELEVANT CONSTITUTIONAL, STATUTORY AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
ARGUMENT	8
I. THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH DECISIONS OF THE UNITED STATES SUPREME COURT AND WITH DECISIONS OF UNITED STATES COURTS OF APPEAL	8

TABLE OF CONTENTS (continued)

	Page
CONCLUSION	17
APPENDIX A -- Opinion of the United States Court of Appeals for the First Circuit	1a
APPENDIX B -- Opinion of the United States District Court, District of Massachusetts	14a
APPENDIX C -- Relevant Constitutional, Statutory, and Regulatory Provisions	20a
APPENDIX D -- Complaint	43a
Exhibit A to Complaint -- Individual Hospital Application for Geographic Reclassification Effective Federal Fiscal Year 2000	58a
Exhibit B to Complaint -- Notice of Dismissal	71a
Exhibit C to Complaint -- Appeal to Health Care Financing Administration (HCFA)	72a
Exhibit D to Complaint -- Decision of Administrator, Health Care Financing Administration (HCFA)	111a
Exhibit E to Complaint -- Request for Amendment of Administrator's Decision	115a
Exhibit F to Complaint -- Administrator's Denial of Request to Amend the Decision	147a

TABLE OF AUTHORITIES

	Page(s)
Supreme Court Cases	
Bell v. Hood, 327 U.S. 678, 90 L. Ed. 939, 66 S. Ct. 773 (1946)	9
Hagans v. Lavine, 415 U.S. 528, 39 L. Ed. 2d 577, 94 S. Ct. 1372 (1974)	14
Oneida Indian Nation of N.Y. v. County of Oneida, 414 U.S. 661 39 E. Ed. 2d 368, 79 S. Ct. 468 (1959)	9
Owasso Independent School District No-I-011, AKA Owasso Public Schools v. Falvo, 122 S. Ct. 934 (2002)	9-10, 13
Steel Company, AKA Chicago Steel and Pickling Company v. Citizens For A Better Environment, 523 U.S. 83 (1998)	*passim*
Circuit Court Cases	
Jordan Hospital, Inc. v. Shalala, 276 F.3d 72 (1st Cir. 2002)	*passim*
Kroll v. Finnerty, 242 F.3d 1359, 1362 (D.C. Cir. 2001)	14, 16
Lasalle Nat. Trust v. ECM Motor Co., 76 F.3d 140 (7th Cir. 1996)	14, 16
Paluca v. Secretary of Labor, 813 F.2d 524 (1st Cir. 1987)	8 n. 2

TABLE OF AUTHORITIES (continued)

	Page(s)
Roma Construction Company v. Arusso, 96 F.3d 566 (1st Cir. 1996)	12, 13
Tekkno Labs. v. Perales, 933 F.3d 1093 (2d Cir. 1991)	11 n. 3
United States v. Morros, 268 F.3d 695 (9th Cir. 2001)	14, 16
Constitutional Provisions	
U.S. CONST. amend. V	2
U.S. CONST. amend. XIV, § 1	2
Statutes	
28 U.S.C. § 1254	2
28 U.S.C. §1254(1)	1
28 U.S.C. § 1331	2
42 U.S.C. § 1395ww(d)(10)	2
42 U.S.C. § 1395ww(d)(10)(A)	4
42 U.S.C. § 1395ww(d)(10)(C)(iii)(II)	3, 7 n. 1, 8 n. 2
Regulations	
42 C.F.R. § 412.230	2
42 C.F.R. § 412.230(c)	3
42 C.F.R. § 412.278	2
42 C.F.R. § 412.278(g)	6

TABLE OF AUTHORITIES (continued)

	Page(s)
60 FR 45778 (September 1, 1995)	2, 5
62 FR 45966 (August 29, 1997)	2, 11 n. 3
Rules	
Fed. R. Civ. P. 12(b)(1)	6, 8, 10, 11 n. 3, 15, 16
Fed. R. Civ. P. 12(b)(6)	8, 11, 12, 15, 16
Fed. R. Civ. P. 12(b)(6)(1)	15
Fed. R. Civ. P. 12(h)(2)	13
Fed. R. Civ. P. 12(h)(3)	13
Fed. R. Civ. P. 56	15
Other	
New Webster's Dictionary, 194 (rev. ed. 1992)	12 n. 4

IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 2001

JORDAN HOSPITAL, INC.

Petitioner,

v.

DONNA E. SHALALA, in her capacity as Secretary
of the Department of Health and Human Services,
NANCY-ANN MIN DEPARLE, in her capacity as Administrator
of the Health Care Financial Administration, and
the MEDICARE GEOGRAPHIC CLASSIFICATION REVIEW BOARD

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner hereby petitions this Court to grant a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 276 F.3d 72. Appendix (App.) 1a. The district court's Memorandum of Decision was not a published opinion. App. 14a.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on January 10, 2002. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1), and jurisdiction in the court of first instance arose under 28 U.S.C. § 1331.

RELEVANT CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

The relevant constitutional provisions, U.S. CONST. amend. V and U.S. CONST. amend. XIV, § 1, are reproduced in Appendix C at App. 20a. The relevant statutory provisions, 42 U.S.C. § 1254, 42 U.S.C. § 1331, and 42 U.S.C. § 1395ww(d)(10), are reproduced in Appendix C at App. 20a-25a. The relevant regulatory provisions, 42 C.F.R. § 412.230, 42 C.F.R. § 412.278, 60 FR 45778, and 62 FR 45966, are reproduced in Appendix C at App. 25a-42a.

STATEMENT OF THE CASE

This case involves the annual process by which the Secretary of the Department of Health and Human Services ("Secretary") and the Health Care Financing Administration ("HCFA", now the Centers For Medicare and Medicaid Services) set prospective payment rates by which Medicare providers such as Plaintiff Jordan Hospital, Inc. ("Jordan") will be paid for inpatient services in the upcoming fiscal year. HCFA determines these rates based, in part, on a hospital's geographic location, and a hospital, by statute, may apply for and obtain geographic reclassification if certain requirements are met. Reclassification can result in more favorable reimbursement for a hospital.

HCFA improperly denied Jordan its right to geographic reclassification for the fiscal year 2000. In 1998, HCFA published erroneous data that led Jordan to believe that it was not eligible for reclassification for the fiscal year 2000, when, in fact, the hospital was eligible for reclassification. Relying on the erroneous data, Jordan did not seek reclassification for fiscal year 2000. After the application deadline passed, Jordan discovered HCFA's error and submitted an application for reclassification. HCFA denied the application as untimely, even though it had been HCFA's own error that had caused Jordan to not apply within the statutorily prescribed time period. Through this action, HCFA deprived Jordan of an additional $1.8 million in Medicare reimbursement.

Jordan brought this action to seek redress for the deprivation of due process it suffered when HCFA refused to permit it to apply for reclassification after the statutorily deadline. HCFA's failure to gather and publish accurate information deprived Jordan of its right to receive meaningful notice regarding its eligibility for reclassification, and that deprivation, in conjunction with HCFA's steadfast refusal to allow Jordan to file an application subsequent to the hospital's discovery of HCFA's error constitutes a violation of Jordan's due process rights.

Through this action, Jordan is not seeking judicial review of a reclassification decision, which is prohibited by 42 U.S.C. § 1395ww(d)(10)(C)(iii)(II). Rather, Jordan's claim is collateral to the reclassification determination, in that it challenges the constitutionality of the manner in which HCFA has administered the statute.

The relevant facts, in more detail, are as follows. Jordan is a participating provider in the Medicare program. Complaint, ¶11, App. 46a. As such, Jordan receives Medicare reimbursement under the prospective payment system. Id., ¶12, App. 46a. Under this system, reimbursement rates are predetermined based on a number of factors, including the average standardized amount of allowable individual hospital inpatient operating costs and the area wage index applicable to the hospital. Id., ¶13, App. 46a. These factors are based in part on the hospital's geographic location. Id., App. 46a.

To avoid inequities arising from geographic location, a hospital may apply for "reclassification" to another geographic area for the purpose of utilizing that area's standardized amount of operating costs or wage index, or both, in calculating prospective payment rates. Id., ¶14, App. 46a. The criteria for obtaining reclassification of the wage index are set forth in 42 C.F.R. § 412.230(c) and include, *inter alia*, a requirement that the hospital's average hourly wage be at least 108% of the average hourly wage of the hospitals in the area in which the hospital is located and that the hospital's average hourly wage be at least 84% of the average hourly wage of hospitals in the area in which it seeks reclassification. Id., ¶15, App. 47a. Review of whether the

relevant criteria have been satisfied is undertaken by the Medicare Geographic Classification Review Board ("the Board"), an entity established by 42 U.S.C. § 1395ww(d)(10)(A). Complaint, ¶8, App. 45a. An application for reclassification is to be submitted by the first day of the thirteen-month period ending September 30 of the preceding fiscal year. Id., ¶16, App. 47a. Thus, for reclassification applicable to fiscal year 2000, which commenced October 1, 1999, a hospital was required to submit its application for reclassification on or before September 1, 1998. Id., ¶16, App. 47a.

Jordan timely filed and was granted requests for reclassification for the fiscal years 1998 and 1999, resulting in its being reclassified from the Boston, Massachusetts area to the Barnstable-Yarmouth, Massachusetts area. Id., ¶17, App. 47a. Jordan did not file such a request for fiscal year 2000 within the statutorily prescribed time period. Id., ¶20, App. 48a. Jordan's decision not to file was premised on its conclusion, reached after reviewing the hourly wage data published in the July 31, 1998 Federal Register, that it did not qualify for reclassification because its average hourly wage was less than 84% of the Barnstable-Yarmouth area average hourly wage. Id., ¶¶19, 20, App. 48a.

Jordan subsequently learned that Cape Cod Hospital, a Medicare provider located in the Barnstable-Yarmouth, Massachusetts area, had notified its fiscal intermediary of errors in Cape Cod Hospital's 1994, 1995, 1996 and 1997 cost reports, including errors relating to wage data reported for 1995. Id., ¶21, App. 48a. The erroneous data were used to calculate the average hourly wage for the Barnstable-Yarmouth, Massachusetts area for the fiscal year 1999 wage index published by HCFA in the July 31, 1998 Federal Register. Id., ¶21, App. 48a. Jordan was entitled (and, in fact, required) to rely upon the data in determining whether to submit a request for reclassification for fiscal year 2000. Id., App. 48a.

The publication of the erroneous data resulted from HCFA's failure to discharge its obligation to provide Jordan with the accurate information it needed in order to file a timely application for reclassification. Id., ¶¶36-46, App. 51a-55a. One

example of this deficiency involves HCFA's failure to follow its own rules, which required review of the percentage change in the wage index reported by individual hospitals from year to year, with an added level of review and confirmation of the accuracy of the data where the wage data for any hospital produced a change of ten percent or more. Id., ¶40 (*quoting* 60 Fed. Reg. 45778, 45793 (September 1, 1995)), App. 53a. With the erroneous data reported by Cape Cod Hospital, the average hourly wage for the Barnstable-Yarmouth, Massachusetts area rose from $28.72 in fiscal year 1998 to $31.96 in fiscal year 1999, an increase of 11.28%. Complaint, ¶41, App. 53a. Had HCFA followed the prescribed review and confirmation process and fulfilled its obligation to detect and correct erroneous information, the inaccurate data reported by Cape Cod Hospital would have been detected and corrected in a timely manner. Id., ¶42, App. 54a.

The revisions reported by Cape Cod Hospital reduced the average hourly wage for the Barnstable-Yarmouth, Massachusetts area such that Jordan was eligible for reclassification under the 108%-84% criteria. Id., ¶22, App. 48a. Despite the significant impact of these reported revisions, no changes to the fiscal year 1999 wage index for the Barnstable-Yarmouth, Massachusetts area were ever published by HCFA. Id., ¶23, App. 49a. Had the information in the fiscal year 1999 wage index published by HCFA been accurate, Jordan could and would have filed a request for reclassification. Id., ¶24, App. 49a. Jordan would have received approximately $1.8 million more in Medicare program reimbursement had it been reclassified. Id., ¶25, App. 49a.

After learning of the errors in Cape Cod Hospital's cost report, Jordan submitted an Individual Hospital Application for Geographic Reclassification Effective Federal Fiscal Year 2000 ("Application") to the Board. Id., ¶26, App. 49a (attached to Complaint as Exhibit A, App. 58a-70a.) In the Application, Jordan requested reclassification and informed the Board that its application was filed after the normal deadline as a result of the significantly erroneous hourly wage data published in the July 31, 1998 Federal Register. Id., ¶27, App. 50a. On August 24, 1999, one week after the Application was filed, the Board dismissed it on

the grounds that it was untimely, refusing to consider its merits. Id., ¶28, App. 50a (attached to Complaint as Exhibit B, App. 71a.)

Jordan timely filed an appeal of the Board's decision to the Administrator of HCFA reiterating the reason for the post-deadline submission. Id., ¶29, App. 50a (attached to Complaint as Exhibit C, App. 72a-110a.) When that appeal was denied, Jordan submitted a request pursuant to 42 C.F.R. § 412.278(g) to amend the decision, again citing the erroneous data published by HCFA as the basis for the delay in filing. Id., ¶31, App. 50a (attached to Complaint as Exhibit E, App. 115a-146a.) That request was denied on the grounds that the basis provided was insufficient to satisfy the criteria for amending a decision under the regulation. Id., ¶32, App. 51a (attached to Complaint as Exhibit F, App. 147a.)

Jordan filed its Complaint on April 7, 2000, seeking relief on two counts. The first count alleged a violation of Jordan's due process rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. In the second count, Jordan sought a declaration that HCFA's rules and regulations relating to the reclassification process were invalid as applied to the present case.

The defendants filed a motion to dismiss on August 18, 2000. That motion was premised on the contention that the district court lacked subject matter jurisdiction to decide the controversy and therefore that dismissal was compelled by Fed. R. Civ. P. 12(b)(1). After hearing, the district court granted the defendants' motion on March 22, 2001. While the district court granted HCFA's Rule 12(b)(1) motion, it also noted in its Memorandum of Decision that the defendants had also argued that even if the district court had subject matter jurisdiction, Jordan's action should be dismissed because Jordan's due process rights were not violated. Memorandum of Decision, App. 17a. The court noted that that issue was not properly within the scope of a motion to dismiss for lack of subject matter jurisdiction. Id., App. 17a.

Jordan appealed the dismissal to the United States Court of Appeals for the First Circuit. In its appeal, Jordan renewed its argument that its procedural due process rights were violated

because it was denied an opportunity to be heard on the merits of its reclassification application.

The First Circuit affirmed the dismissal. See Jordan Hospital, Inc. v. Shalala, 276 F.3d 72, 80 (1st Cir. 2002), App. 13a. Regarding Jordan's constitutional claim, the court stated that "to prevail on its procedural due process claim, Jordan must show both that it had a recognized liberty interest, and was deprived of that interest without adequate notice or a meaningful opportunity to be heard." Id. at 78, App. 9a. The court opined that Jordan did not raise a colorable constitutional claim because, in its view, (1) HCFA's regulatory scheme provided Jordan with sufficient procedural protections, (2) HCFA publication of erroneous data did not deprive Jordan of its rights, (3) Jordan could not have realistically assumed that the wage index information would always be accurate and (4) Cape Cod Hospital, not HCFA, was the party to blame because the hospital reported incorrect data. Id. at 78-79, App. 8a-12a.[1]

---

[1] The First Circuit made essentially three separate determinations in its opinion. The court first opined that Jordan was precluded from seeking judicial review of the dismissal of its application for redesignation as a result of the language of 42 U.S.C. § 1395ww(d)(10)(C)(iii)(II), rejecting Jordan's argument that there was a critical difference between "decisions" on the merits and "dismissals" for untimeliness. Id. at 76-77, App. 4a-8a. The court then ruled that Jordan's due process claim was not a colorable constitutional claim. Id. at 78-79, App. 8a-12a. The court finally concluded that equitable tolling was not available to Jordan. Id. at 79-80, App. 10a-12a. This petition focuses on the standard that the circuit court used to cast aside Jordan's due process claim.

ARGUMENT

I. THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH DECISIONS OF THE UNITED STATES SUPREME COURT AND WITH DECISIONS OF UNITED STATES COURTS OF APPEAL

The central issue presented in this petition is whether a federal court may dismiss an otherwise viable federal constitutional claim for lack of subject matter jurisdiction because, in the court's eyes, the claim lacks merit.[2] The First Circuit, believing that it had expansive power to do so, dismissed Jordan's constitutional claim for lack of subject matter jurisdiction, because, in the court's opinion, the claim was not "colorable." Jordan, 276 F.2d at 78, App. 9a. The standard applied by the circuit court, however, conflicts with the standard set out in the decisions of this Court and with the decisions of other circuit courts regarding when a merits issue becomes a jurisdictional one. As a practical matter, in its decision, the First Circuit essentially erased the difference between Federal Rule of Civil Procedure 12(b)(1) motions to dismiss for lack of subject matter jurisdiction and Rule 12(b)(6) motions to dismiss for failure to state a claim upon which relief can be granted.

In Steel Company, AKA Chicago Steel and Pickling Company v. Citizens For A Better Environment, 523 U.S. 83, 89 (1998), the Court addressed the question of whether the absence of a valid federal cause of action implicates subject matter

---

[2] The bar on judicial review of reclassification determinations at 42 U.S.C. § 1395ww(d)(10)(C)(iii)(II) does not, as a threshold matter, apply to Jordan's due process claim, because Jordan is not challenging HCFA's reclassification decision; rather the hospital is challenging what it alleges was the unconstitutional process that produced that decision. See Paluca v. Secretary of Labor, 813 F.2d 524, 526-28 (1st Cir. 1987).

jurisdiction. The Court ruled that this was true only in the most extreme cases, and it set out the following standard:

> [J]urisdiction ... is not defeated ... by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover.... Dismissal for lack of subject matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as to not invoke a federal controversy.'

Id. (citing Bell v. Hood, 327 U.S. 678, 682, 90 L. Ed. 939, 66 S. Ct. 773 (1946) and Oneida Indian Nation of N.Y. v. County of Oneida, 414 U.S. 661, 666, 39 E. Ed. 2d 368, 79 S. Ct. 468 (1959)). Steel Company involved a private enforcement action under the citizen-suit provision of the Emergency Planning and Community Right-To-Know Act ("EPCRA"). Id. at 86. At issue was whether EPCRA allowed suits for purely historical violations of that statute. Id. at 88. The district court, believing that historical violations could not give rise to suit, ruled (1) that the plaintiff had failed to state a claim upon which relief could be granted with respect to the past violations, and (2) that it had no jurisdiction to entertain a suit for a present violation, because the defendant was in compliance with the statute at the time of suit. Id. After a reversal by the Seventh Circuit, the court granted certiorari to resolve a circuit conflict regarding the interpretation of EPCRA. Id. The court ultimately ruled that the lower court had no jurisdiction because the plaintiff had no standing, but in doing so, the court, as noted above, made it clear that the merits issue becomes jurisdictional only in the most extreme cases. Id. at 89, 109-10.

The Court's holding regarding when a merits issue may be treated as jurisdictional was very recently confirmed in Owasso Independent School District No-I-011, AKA Owasso Public

Schools v. Falvo, 122 S. Ct. 934, 938 (2002). In Owasso, a mother of three children brought suit under 42 U.S.C. § 1983 alleging that the practice of peer grading (having other students grade her childrens' papers) violated the Family Educational Rights and Privacy Act ("FERPA"), which prohibits the release of certain student records without parental consent. Id. at 936-37. The Court left open the question of whether FERPA provides private parties with a cause of action under § 1983, and instead analyzed the issue of whether the peer-graded assignments constitute protected educational records under FERPA. Id. at 938. The Court, before analyzing this question, cited the Steel Company decision and ruled that it had subject matter jurisdiction:

> Though we leave open the § 1983 question, the Court has subject-matter jurisdiction because respondent's federal claim is not so 'completely devoid of merit as not to involve a federal controversy.'

Id. Ultimately, the court decided that peer-graded assignments were not protected records under FERPA, but, critically for this petition, the court, following Steel Company, found that federal courts may only consider the merits issue as jurisdictional in those extreme cases in which the federal claim is completely without merit. Id. at 938, 940-41.

The First Circuit did not follow this standard when it dismissed Jordan's constitutional claim. HCFA moved to dismiss solely under Rule 12(b)(1) for lack subject matter jurisdiction. As a result, the First Circuit had before it only the question of whether there was federal subject matter jurisdiction over Jordan's claims, including its constitutional due process claim. Jordan, 276 F.3d at 74, App. 2a. As a result, the court was obligated to apply the standard in Steel Company if it chose to dismiss Jordan's federal

constitutional claim for lack of subject matter jurisdiction solely because it lacked merit.[3]

The First Circuit failed to apply the Steel Company standard, and instead it erroneously analyzed Jordan's claims as if HCFA had brought a Rule 12(b)(6) motion to dismiss, which it had not done. This is manifestly clear from the court's reasoning regarding why Jordan's constitutional claim was subject to dismissal.

The circuit court first stated that to prevail on its procedural due process claim, Jordan had to show both that it had a recognized liberty or property interest, and was deprived of that interest without adequate notice or a meaningful opportunity to be heard. Jordan, 276 F.3d at 78. App. 9a. The court then made it apparent that it would review Jordan's constitutional claim on the merits, pursuant to the standard that applies when a defendant has brought a motion under Rule 12(b)(6) for failure to state a claim:

> Assuming, without deciding that Jordan as a legitimate property interest in receiving reimbursement payments, we must then determine

---

[3] As noted above, the district court expressly noted that the question of whether Jordan's constitutional claim stated a claim was not properly within the scope of a Rule 12(b)(1) motion to dismiss. Memorandum of Decision, App. 17a. Despite making this statement, the district court dismissed all of Jordan's claims, including its constitutional claims, without applying the standard set out in Steel Company. Thus, the district court and the appellate court made the identical analytical error in ruling on defendants' 12(b)(1) motion to dismiss. Jordan's claim would have survived had the circuit court applied the Steel Company standard, because, in its complaint, Jordan alleged that HCFA's failure to provide adequate notice to Jordan of its right to apply for reclassification, and HCFA's refusal to consider the merits of Jordan's request for reclassification when it was ultimately filed constituted deprivations of due process guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution, Complaint, ¶46, App. 54a. In addition, because the right of reclassification is a right provided by statute, it constitutes a cognizable property interest, the deprivation of which is sufficient to support subject matter jurisdiction. See Tekkno Labs. v. Perales, 933 F.3d 1093, 1099-1100 (2d Cir. 1991) (Oakes, C.J., concurring) (suggesting that Medicaid provider has a property interest in reimbursement for Medicaid services already performed). Moreover, in considering Jordan's allegations, it is noteworthy that foremost among HCFA's responsibilities with respect to the reclassification process is the furthering of "the fundamental objective in administering the wage index ... to ensure that it is accurate and fair." 62 Fed. Reg. 45966, 45984 (August 29, 1997).

> whether Jordan raises a colorable constitution claim.

Id. (emphasis added). App. 9a. In the First Circuit, the standard against which 12(b)(6) motions to dismiss are judged is as follows:

> Upon considering a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), the district court should not grant the motion unless it appears to a certainty that the plaintiff would be unable to recover under any set of facts.

Roma Construction Company v. Arusso, 96 F.3d 566, 569 (1st Cir. 1996). By stating that it would decide if Jordan's constitutional was "colorable,"[4] the circuit court was clearly using the First Circuit's 12(b)(6) standard to determine if Jordan's due process claim lacked merit to such a degree that the court did not have jurisdiction over it. In so doing, the First Circuit failed to apply the standard set out in Steel Company, because it at no point analyzed whether Jordan's federal constitutional claim was "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as to not invoke a federal controversy." Steel Company, 523 U.S. at 89. The court failed to even cite to the Steel Company decision.

After indicating that it would use the 12(b)(6) standard to assess Jordan's constitutional claim on the merits, the circuit court then ruled that the claim was not colorable. Id. at 78-79. App. 8a-12a. Despite the fact that Jordan had alleged that the inaccurate data reported by Cape Cod Hospital would have been detected and corrected in a timely manner if HCFA had followed the prescribed review and confirmation process and fulfilled its obligation to detect and correct erroneous information,[5] the First Circuit opined

---

[4] The New Webster's Dictionary and Thesaurus defines "colorable" as "plausible, seeming true." New Webster's Dictionary, 194 (rev. ed. 1992).

[5] Complaint, ¶42, App. 54a.

that the district court had properly rejected Jordan's constitutional claim because, in the court's eyes, (1) HCFA's regulatory scheme provided Jordan with sufficient procedural protections, (2) HCFA publication of erroneous data did not deprive Jordan of its rights, (3) Jordan could not have realistically assumed that the wage index information would always be accurate and (4) Cape Cod Hospital, not HCFA, was the party to blame, because the hospital reported incorrect data. Id. at 78-79, App. 8a-12a. Given Jordan's allegations regarding HCFA's failure to detect and correct the erroneous Cape Cod Hospital data, it is arguable whether the First Circuit even correctly applied the requirement that Jordan's claim not be dismissed unless it appeared to a certainty that Jordan would be unable to recover under any set of facts. See Roma, 96 F.3d at 569. What is not arguable is that the circuit court, in dismissing Jordan's constitutional claim, applied a standard different from the standard set out in Steel Company.

The First Circuit's ruling conflicts directly with the Supreme Court's decisions in Steel Company and Owasso regarding an important federal question, specifically, the scope of federal subject matter jurisdiction. The First Circuit has chosen to dramatically curtail that jurisdiction by ruling that a federal constitutional claim may be dismissed for lack of subject matter jurisdiction if, in a court's eyes, the claim fails to state a claim upon which relief can be granted.

By converting a merits issue into a jurisdictional one, the First Circuit has also rewritten Rule 12(h) of the Federal Rules of Civil Procedure. That rule states that a motion to dismiss for lack of subject matter jurisdiction may be brought at any time, including on appeal, but that a motion to dismiss for failure to state a claim cannot be brought post-trial. Fed. R. Civ. P. 12(h)(2), (3). In its opinion dismissing Jordan's appeal, the First Circuit has changed this rule, because a defendant may now move to dismiss a plaintiff's claim for failure to state a claim at any point, even on appeal, by merely arguing that the reviewing court lacks subject matter jurisdiction, because the claim is not colorable.

By failing to apply the jurisdictional standard set out in Steel Company, the First Circuit's decision in this matter also

conflicts with the decisions in several Courts of Appeals, which either apply the Steel Company standard or a similar standard. See e.g., United States v. Morros, 268 F.3d 695, 699 (9th Cir. 2001) (citing Steel Company and ruling that the district court erred in ruling that subject matter jurisdiction did not exist); Kroll v. Finnerty, 242 F.3d 1359, 1362, 1367 (D.C. Cir. 2001) (finding subject matter dismissal appropriate because alleged basis for federal jurisdiction was "so attenuated and unsubstantial as to be absolutely devoid of merit").

In Lasalle Nat. Trust v. ECM Motor Co., 76 F.3d 140, 141-42 (7th Cir. 1996), the Seventh Circuit, applying a standard similar to that in Steel Company, reversed the district's dismissal for lack of subject matter jurisdiction, and provided a thoughtful and compelling analysis regarding why federal courts should rarely dismiss federal claims for lack of subject matter jurisdiction solely because those claims may lack merit. In Lasalle, which involved a real estate transaction, the buyer brought suit against the seller in federal court under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") and under state law to collect certain clean up expenses. Id. at 142. The district court dismissed for lack of subject matter jurisdiction, because it believed that certain contractual language executed by the parties barred plaintiff from bringing any statutory claims. Id.

The Seventh Circuit reversed and remanded. In setting forth its reasoning, the court first noted that it would apply a standard similar to that set out in Steel Company to determine whether the plaintiff's claim warranted dismissal:

> As the Supreme Court noted in Hagans v. Lavine, 415 U.S. 528, [536], 39 L. Ed. 2d 577, 94 S. Ct. 1372 (1974), it "has repeatedly held that the federal courts are without power to entertain claims otherwise within their jurisdiction if they are 'so attenuated and unsubstantial as to be absolutely devoid of merit.'"

Id. at 143. The Seventh Circuit stated that such a dismissal would rarely be appropriate, "Through its choice of language, however, the [Supreme] Court has also made clear that only the most extreme cases will fail the jurisdictional test of substantiality." Id.

The Seventh Circuit also found that there were important policy and practical reasons for not dismissing a federal claim for lack of subject matter jurisdiction solely because the claim may not ultimately be successful:

> In some cases, the distinction between a claim that is wholly frivolous for jurisdictional purposes and a claim that is doomed on the merits may seem medieval in its fineness, and may be of little practical importance. Nonetheless, the distinction is one that the Supreme Court has always recognized, and it rests on both sound policy grounds as well as practical considerations. From a policy standpoint, it underscores the importance of giving a full hearing to those who are attempting to raise claims in federal court, even if those claims are eventually unsuccessful. From the more pragmatic side, the way in which the facts are handled under Fed. R. Civ. P. 12(b)(1) differs significantly from the correct approach for purposes of Rule 12(b)(6), and the Rule 12 procedures differ again from those used for Rule 56.

Id. at 144. The court then expanded on the practical reasons why federal courts should rarely invoke lack of subject jurisdiction to, in essence, make a decision that a claim fails to state a claim upon which relief may be granted:

> It is plain that the factual posture of these kinds of pretrial dispositive motions can be critical. In the 12(b)(1) case, the district court is entitled to find

> jurisdictional facts itself; in the 12(b)(6) case, the court is required to keep the case if there is any set of facts under which the plaintiff might prevail, ... and for Rule 56, all disputed material facts must be viewed in the light most favorable to the party opposing the motion, although that party has the burden ... to come forward with evidence showing the genuineness of any factual disputes that it asserts must be tried.

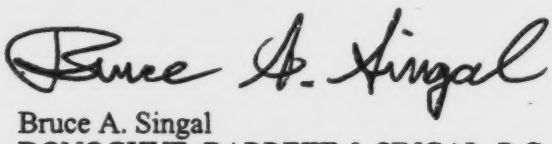
Id. The court then provided the admonition that while the district court must conduct a preliminary inquiry to decide whether a case is nonfrivolous, "this inquiry cannot be a 'doppleganger of the inquiry on the merits.'" Id.

The First Circuit failed to heed this warning. Despite the fact that the only issue before the First Circuit was whether the district court erred in granting HCFA's Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, the First Circuit conducted a merits inquiry on Jordan's constitutional claim and failed to apply properly the standard set out not only in the Supreme Court's Steel Company decision, but also in the Morros, Kroll and Lasalle decisions noted herein. In sum, by essentially granting a Rule 12(b)(6) dismissal under the guise of Rule 12(b)(1), the court exceeded the scope of the question presented to it and issued an opinion in conflict with the decisions of this Court and several Courts of Appeal.

CONCLUSION

For the reasons stated above, Jordan respectfully requests that its petition for writ of certiorari be granted.

Respectfully submitted,



Bruce A. Singal
DONOGHUE, BARRETT & SINGAL, P.C.
One Beacon Street, Suite 1320
Boston, Massachusetts 02108
(617) 720-5090

Counsel for Petitioner

Dated: April 9, 2002

Supreme Court, U.S.
FILED

011495 APR 10 2002

OFFICE OF THE CLERK

No. 01-

IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 2001

JORDAN HOSPITAL, INC.
Petitioner,

v.

DONNA E. SHALALA, in her capacity as Secretary
of the Department of Health and Human Services,
NANCY-ANN MIN DEPARLE, in her capacity as Administrator
of the Health Care Financial Administration, and
the MEDICARE GEOGRAPHIC CLASSIFICATION REVIEW BOARD
Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the First Circuit**

APPENDIX

Bruce A. Singal
DONOGHUE, BARRETT & SINGAL, P.C.
One Beacon Street
Boston, MA 02108
(617) 720-5090

Counsel for Petitioner

149PP

TABLE OF CONTENTS

	Page
APPENDIX A -- Opinion of the United States Court of Appeals for the First Circuit	1a
APPENDIX B -- Opinion of the United States District Court, District of Massachusetts	14a
APPENDIX C -- Relevant Constitutional, Statutory, and Regulatory Provisions	20a
APPENDIX D -- Complaint	43a
Exhibit A to Complaint -- Individual Hospital Application for Geographic Reclassification Effective Federal Fiscal Year 2000	58a
Exhibit B to Complaint -- Notice of Dismissal	71a
Exhibit C to Complaint -- Appeal to Health Care Financing Administration (HCFA)	72a
Exhibit D to Complaint -- Decision of Administrator, Health Care Financing Administration (HCFA)	111a
Exhibit E to Complaint -- Request for Amendment of Administrator's Decision	115a
Exhibit F to Complaint -- Administrator's Denial of Request to Amend the Decision	147a

APPENDIX A

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 01-1614

JORDAN HOSPITAL, INC.,

Plaintiff, Appellant,

v.

DONNA E. SHALALA, ETC., ET AL.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
(Hon. Rya W. Zobel, U.S. District Judge)

Before
Before Selya, Circuit Judge,
Stahl, Senior Circuit Judge,
and Lynch, Circuit Judge.

Bruce A. Singal, with whom Paul M. Barrett, William C. Athanas, and Donoghue, Barrett & Singal, P.C., were on brief for appellant.

Anita Johnson, Assistant United States Attorney, with whom James B. Farmer, United States Attorney, was on brief for appellee.

January 10, 2002

STAHL, Senior Circuit Judge. Plaintiff-Appellant, Jordan Hospital, Inc. ("Jordan"), filed this lawsuit challenging the dismissal of its request for reclassification into a neighboring geographic region. Success in obtaining reclassification would have entitled Jordan to an additional $1.8 million in Medicare reimbursements for the fiscal year in question. The district court dismissed Jordan's complaint for lack of subject matter jurisdiction under 28 U.S.C. § 1331, and Jordan now appeals.

First, Jordan disputes the district court's conclusion that judicial review of this administrative decision is precluded by law. Second, Jordan challenges the validity of the implementing regulations underlying the reclassification process, see 42 C.F.R. § 412 et seq., as inconsistent with the statutory scheme set forth in 42 U.S.C. § 1395ww, and alleges that its procedural due process rights have been violated. Finally, Jordan posits that the district court erred because the statutory deadline for filing a reclassification application is subject to the doctrine of equitable tolling. Finding all of Jordan's arguments meritless, we affirm.

I.

Jordan, a participating provider in the Medicare program,[1] is located in Plymouth, Massachusetts, but has regularly applied, under the prospective payment system ("PPS"), for reclassification to the Barnstable-Yarmouth (Cape Cod) area. Under the PPS, reimbursement rates are determined by using factors that include (1) the average standardized amount of allowable individual hospital inpatient operating costs, and (2) the area wage index applicable to the hospital. Reclassification

---

[1] Medicare provides for the payment of inpatient hospital and other health services furnished to eligible aged and disabled individuals. See 42 U.S.C. § 1395 et seq.

allows a hospital to utilize the standardized operating costs or wage index, or both, of a neighboring region if higher than the prevailing rate in its own geographic area, to calculate its prospective reimbursement. A hospital requesting reclassification must submit average hourly wage ("AHW") data obtained from the Health Care Financing Administration ("HCFA") hospital wage survey, which is "used to construct the wage index in effect for prospective payment purposes during the fiscal year prior to the fiscal year for which the hospital requests reclassification." 42 C.F.R. § 412.230(e)(2)(i)(A). The criteria for obtaining wage index reclassification are set forth in 42 C.F.R. § 412.230(e), and include, *inter alia*, a requirement that the hospital's AHW be at least 108% of the AHW of the hospitals in the area in which the hospital is located, and the hospital's AHW be at least 84% of the AHW of hospitals in the area to which it seeks to be redesignated. Id. § 412.230(e)(1).

Prior to the promulgation of the final PPS rates for an upcoming fiscal year, HCFA is required to adjust the rates to incorporate the effects of any reclassifications that have been approved. The agency's initial task is to recompute the wage index for such year. Once the necessary wage index adjustments have been completed, the agency must ensure that the effects of the reclassification process are "budget neutral."[2]

Pursuant to 42 U.S.C. § 1395ww(d)(10), the Medicare Geographic Classification Review Board ("Board") is authorized to rule on applications submitted by hospitals seeking reclassification to an adjacent geographical area. A hospital seeking reclassification for a fiscal year must submit its

---

[2] The "budget neutrality" principle requires that HCFA make any adjustments necessary to ensure that the aggregate payments to be made under the PPS as a result of any reclassifications are equal to the aggregate payments that would have been made absent these reclassifications. 42 U.S.C. § 1395ww(d)(8)(D).

application to the Board "not later than the first day of the 13-month period ending on September 30 of the preceding fiscal year." Id. § 1395ww(d)(10)(C)(ii). The Board is required to render its decision on the application "not later than 180 days after [this] deadline ...." Id. § 1395ww(d)(10)(C)(iii)(I). If dissatisfied with the Board's decision, a hospital has 15 days to appeal the decision to the Administrator of HCFA, who is required to issue a decision on the appeal "not later than 90 days after the appeal is filed." Id. § 1395ww(d)(10)(C)(iii)(II). HCFA's decision, which becomes the final decision of the Secretary of Health and Human Services ("HHS"),[3] "shall be final and shall not be subject to judicial review." Id.

Jordan filed its application for reclassification, for wage-index purposes, to the Cape Cod Massachusetts Metropolitan Statistical Area ("Cape Cod MSA") for Fiscal Years ("FYs") 1998 and 1999 in a timely manner and these requests were approved by the Board. As a result, Medicare reimbursed Jordan for those fiscal years according to the wage-index value calculated for the Cape Cod MSA rather than that of Jordan's own geographic area. However, Jordan did not timely file a request for reclassification to the Cape Cod MSA for FY 2000 by the statutory September 1, 1998 deadline because the hourly wage data published in the July 31, 1998 Federal Register indicated that Jordan did not qualify.

---

[3] Although the statute states that the Secretary of Health and Human Services ("Secretary") shall hear any appeals from adverse decisions by the Board, the Secretary has delegated this function to the Administrator of HCFA. See 55 Fed. Reg. 36,766 (1990), as amended June 4, 1991 ("The Secretary has delegated this authority to the HCFA Administrator in cases in which an unsuccessful hospital appeals the MGCRB's decision. Thus, in these cases the Administrator's review is the final Department review of MGCRB decisions provided for in section 1886(d)(10)(C)(iii)(II) of the Act."); see also 57 Fed. Reg. 39,826 (1992).

As it turned out, the wage data published in the July 31, 1998 Federal Register had been incorrectly calculated because the Cape Cod Hospital had submitted inaccurate wage data to HCFA. Upon learning of this error, Jordan filed a reclassification application for FY 2000 on August 23, 1999, almost a year after the expiration of the statutory filing deadline and 24 days after the publication of the final PPS rates for FY 2000. On August 24, 1999, the Board dismissed Jordan's application on the basis that the request was untimely, rendering Jordan ineligible to receive the additional $ 1.8 million in Medicare program reimbursement to which it would have been entitled had it been reclassified. Jordan appealed, and the HCFA Administrator affirmed the dismissal on September 28, 1999. On October 7, 1999, Jordan requested that the Administrator amend her decision, but this request was denied on October 12, 1999.

On April 7, 2000, after exhausting all administrative remedies, Jordan filed a complaint in the district court, alleging a violation of its due process rights under the Fifth and the Fourteenth Amendments, and seeking a declaration that HCFA's rules and regulations are invalid, both facially and as applied to it. On August 18, 2000, the defendants filed a Rule 12(b)(1) motion to dismiss on the ground that the district court lacked subject matter jurisdiction under 28 U.S.C. § 1331. On March 21, 2001, the district court granted the defendants' motion. Jordan filed a timely notice of appeal.

II.

We review *de novo* a district court's dismissal for lack of subject matter jurisdiction. Corrada Betances v. Sea-Land Serv., Inc., 248 F.3d 40, 44 (1st Cir. 2001).

A.

Defendants argued, and the district court agreed, that Jordan's claim was barred by the "no review" provision of the Medicare Act, 42 U.S.C. § 1395ww(d)(10)(C)(iii)(II), which specifically states that "the decision of the [Administrator] shall be final and shall not be subject to judicial review." On appeal, Jordan contends that § 1395ww(d)(10)(C)(iii)(II), when examined in conjunction with related statutes and regulations, does not bar its claim, emphasizing the fact that there is a "strong presumption that Congress intends judicial review of administrative action." Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 670, 90 L. Ed. 2d 623, 106 S. Ct. 2133 (1986).

This presumption, however, is not irrebuttable, and can be overcome when specific statutory language or legislative history indicates otherwise, or where congressional intent to preclude judicial review is "'fairly discernible' in the detail of the legislative scheme." 476 U.S. at 673 (*quoting* Block v. Cmty. Nutrition Inst., 467 U.S. 340, 349, 351, 81 L. Ed. 2d 270, 104 S. Ct. 2450 (1984)). To prove that Congress has shielded administrative decisions from judicial scrutiny, an agency must show by "clear and convincing evidence" that this was Congress's intent. Abbott Labs. v. Gardner, 387 U.S. 136, 141, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967) (internal quotations omitted). Jordan insists that HCFA has not satisfied this heavy burden. We disagree. The unequivocal language of the "no review" provision clearly indicates that Congress intended to preclude judicial review of this matter. Section 1395ww(d)(10)(C)(iii)(II) explicitly provides that reclassification decisions "shall not be subject to judicial review." By using such plain and unambiguous language, Congress made its intent perfectly clear. Furthermore, the rationale for nonreviewability is eminently logical. First, HCFA's strict, yet manageable,

deadlines ensure that each hospital's classification for a fiscal year is firmly in place in time to allow HCFA to make any necessary wage index revisions and budget neutral adjustments. See 62 Fed. Reg. 45,966, 45,987 (1997). Second, adherence to these strict dates allows HCFA to publish the rates in final form sixty days prior to the start of a fiscal year. See 56 Fed. Reg. 25,458, 25,466 (1991) ("Congress specified these very tight time frames in order to ensure that the effects of reclassifications could be reflected in the new standardized amounts and wage index values ... that go into effect on October 1 of each year."). Subjecting the Administrator's untimeliness decision to judicial review would frustrate this expressly articulated congressional interest in finality, which is particularly crucial for planning purposes.

In a further attempt to bypass the "no review" provision, Jordan posits that there is a material difference between "decisions" on the merits and "dismissals" of applications for untimeliness, rendering "dismissals" reviewable even though all other "decisions" are immune from judicial scrutiny. We reject Jordan's attempt to draw a meaningful distinction between these two terms. In the section outlining the procedures for obtaining administrative review of an adverse ruling by the Board, the regulations offer the right to appeal either a Board "decision" on the merits, or a "dismissal" for untimeliness, to the Administrator. See 42 C.F.R. § 412.278(a) ("A hospital ... dissatisfied with the MGCRB's decision regarding its geographic designation may request the Administrator to review the MGCRB decision. (A hospital ... may also request that the Administrator review the MGCRB's dismissal of an application as untimely filed or incomplete, as provided in § 412.256(d).)"). A decision by the Administrator issued pursuant to § 412.278(a) is a "final Departmental decision .... not subject to judicial review." Id. § 412.278(f)(3). Consequently, there is no basis for any distinction between the terms "dismissal" and "decision."

Moreover, we note as a policy matter that the distinction Jordan proposes would not only disrupt HCFA's efforts to review applications promptly but would also undermine its ability to publish final payment rates under the PPS in a timely manner. Accordingly, we find that Jordan is precluded from seeking judicial review of the dismissal of its application for redesignation.[4]

B.

In the face of this clear congressional mandate against review, Jordan lodges a constitutional challenge, arguing that its procedural due process rights were violated because it was denied an opportunity to be heard on the merits of its reclassification application. More specifically, Jordan alleges that HCFA's publication of erroneous information gave it inadequate notice of its eligibility, thus causing Jordan to file late. Defendants, on the other hand, claim that Jordan has merely attempted to "cloak" its statutory argument with a constitutional one, and insist that, although a gate-closing statute may not preclude consideration of a colorable constitutional claim, a party may not avoid an unambiguous no judicial review provision simply by asserting a challenge "cloaked in constitutional terms." Sugrue v. Derwinski, 26 F.3d 8, 11 (2d Cir. 1994).

---

[4] Jordan also alleges that it is entitled to judicial review of its claim under the Administrative Procedure Act, 5 U.S.C. § 701 et seq. ("APA"). "In the absence of a contrary statutory provision, the APA entitles a person aggrieved by a final agency action to judicial review ...." Conservation Law Found., Inc. v. Busey, 79 F.3d 1250, 1260-61 (1st Cir. 1996) (citing *inter alia* 5 U.S.C. § 702). The APA does not, however, provide "an independent source of subject matter jurisdiction." Id. In this case, § 1395ww clearly precludes judicial review of these types of administrative decisions, and the regulations are consistent with that mandate. Therefore, the APA does nothing to bolster Jordan's position.

To prevail on its procedural due process claim, Jordan must show both that it had a recognized liberty or property interest,[5] and was deprived of that interest without adequate notice or a meaningful opportunity to be heard. Mathews v. Eldridge, 424 U.S. 319, 332-35, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976). Assuming, without deciding, that Jordan has a legitimate property interest in receiving reimbursement payments,[6] we must then determine whether Jordan raises a colorable constitutional claim. We find that it has not.

HCFA's regulatory scheme provides hospitals with a meaningful opportunity to be heard on reclassification, and accords them sufficient procedural protections. HCFA's publication of erroneous data, while unfortunate, did not deprive Jordan of its rights. HCFA takes significant steps to insure that the wage data obtained from hospitals subject to PPS are reasonably accurate. See 63 Fed. Reg. 25,576, 25,587 (1998); 63

---

[5] To date, no federal court has decided whether a physician who provides Medicare services has any type of property interest in receiving payment for those services. The Second Circuit has suggested, in cases involving state Medicaid providers, that some form of property interest may exist under these circumstances. See Tekkno Labs. v. Perales, 933 F.2d 1093, 1099-1100 (2d Cir. 1991) (Oakes, C.J., concurring) (suggesting that Medicaid provider has a property interest in reimbursement for Medicaid services already performed) (*quoting* Oberlander v. Perales, 740 F.2d 116, 120 (2d Cir. 1984)); *but see* Yorktown Med. Lab., Inc. v. Perales, 948 F.2d 84, 89 (2d Cir. 1991) (holding Medicaid provider did not have property interest in payments under Medicaid Act or New York Department of Social Service regulations for claims that were pending investigation).

[6] *But see* Painter v. Shalala, 97 F.3d 1351, 1358 (10th Cir. 1996) ("Although [a physician] may have a recognizable property interest in receiving payment in accordance with the fee schedule ... there is nothing in the Medicare Act which would have led a reasonable physician to believe that he might be entitled to a greater payment than was outlined in the Secretary's fee schedule.").

Fed. Reg. 40,954, 40,966-74 (1998) (discussing the development of the FY 1999 wage index). Jordan could not realistically have assumed that the wage index information would always be accurate, and that if an error were found, it would be remedied in time to permit a reclassification request. Cf. Your Home Visiting Nurse Servs., Inc. v. Shalala, 525 U.S. 449, 455-56, 142 L. Ed. 2d 919, 119 S. Ct. 930 (1999) ("given the administrative realities .... the few dozen fiscal intermediaries often need three years within which to discover overpayments in the tens of thousands of [reimbursement determinations] that they issue"). If anyone is to "blame" in this case, it would seem to be Cape Cod Hospital for reporting incorrect data, rather than HCFA. Accordingly, we find that Jordan's constitutional challenge to the reimbursement scheme was properly rejected by the district court.

C.

Lastly, Jordan asserts that the court should rely upon equitable tolling principles to excuse its tardiness. Jordan relies heavily upon Bowen v. City of New York, 476 U.S. 467, 90 L. Ed. 2d 462, 106 S. Ct. 2022 (1986), a class action challenging an internal policy of the Secretary of Health and Human Services that had resulted in the denial or termination of the class members' benefits. Specifically, the Court addressed the issue of whether equitable tolling applied to save the claims of class members that had been filed outside the 60-day time limit as provided for by 42 U.S.C. § 405(g). 476 U.S. at 480. The Court found that equitable tolling was permissible in that case because it would be fully consistent with the overall congressional purpose (i.e., ensuring that disabled citizens received their benefits), and that tolling would promote the interests of both the claimants and the government. 476 U.S. at 480-81. Bowen, however, does not bear the weight of Jordan's argument in this case. First, the statute in Bowen mandated the action be filed "within sixty days ... or within such further time as the Secretary

may allow." 476 U.S. at 472 n.3. Although the statute in this case afforded Jordan a longer time to file an application for reclassification, it did not provide for discretionary extensions, except for "good cause." 42 C.F.R. § 412.256(c)(2). Jordan still would have had to submit its application by September 1 to be eligible for any discretionary extension for good cause, which it did not do. Second, while the statutory language in Bowen expressed Congress's clear intent to allow tolling in some cases, in this case tolling would be antithetical to the accomplishment of the statute's objectives. Congress apparently found it preferable to allow an occasional unfairness in an individual case to go unaddressed in order to maintain a more workable hospital reclassification process as a whole.[7]

An examination of two pivotal Supreme Court decisions further reinforces our view that equitable tolling would be inappropriate here. In Irwin v. Dep't of Veterans Affairs, 498 U.S. 89 (1990), the Court considered the timeliness of an employee's lawsuit charging his government employer with discrimination, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. In considering Irwin's claims, the Court made clear that the "same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." Irwin, 498 U.S. at 95-96. The Court reached this decision after determining that a rule making equitable tolling applicable to both public and private defendants alike was "likely to be a realistic assessment

---

[7] We note that Cape Cod Hospital's reporting mistakes may, in fact, have erroneously rendered Jordan eligible for reclassification in FY 1999. Consistent with its interest in finality, however, HCFA has apparently not attempted to recover any excessive reimbursements paid to Jordan for that year. Jordan's underpayment in FY 2000 would seem to compensate somewhat for any windfall it enjoyed in FY 1999.

of legislative intent as well as a practically useful principle of interpretation." 498 U.S. at 95.[8]

In United States v. Brockamp, 519 U.S. 347, 136 L. Ed. 2d 818, 117 S. Ct. 849 (1997), the Supreme Court reviewed the case of a taxpayer who had submitted an administrative refund claim several years after the applicable filing period set forth in § 6511 of the Internal Revenue Code of 1986 had elapsed. The Court considered whether, under Irwin, the statutory filing deadline could be extended for an "equitable" reason, which in the petitioner's case was the fact that his mental disability had caused the delay. 519 U.S. at 348. The Court concluded that, in contrast with its generosity for Title VII claims, Congress did not intend for the "equitable tolling" doctrine to apply to § 6511's time limitations for filing tax refund claims. 519 U.S. at 352-53. The Court noted that § 6511 sets forth its time limitations in a highly detailed and technical manner, reiterates them several times in different ways, imposes substantive limitations, and delineates explicit exceptions to its basic time limits, and equitable tolling is not included among them. 519 U.S. at 350-52.

Likewise, in this case, there are strong reasons to believe that Congress did not want the equitable tolling doctrine to apply. First, the statute states in an "unusually emphatic form," 519 U.S. at 350, that a "hospital requesting a change in geographic classification ... for a fiscal year shall submit its application to the Board not later than the first day of the 13-month period ending on September 30 of the preceding fiscal year." 42 U.S.C. § 1395ww(d)(10)(C)(ii). Nothing in this language can be

---

[8] The Court ultimately ruled, however, that equitable tolling was inappropriate in Irwin's case because his late filing was caused by "what [was] at best a garden variety claim of excusable neglect." Irwin, 498 U.S. at 96.

construed as creating or even inferring an implied equitable tolling exception. Irwin, 519 U.S. at 352; see also Becton Dickinson & Co. v. Wolckenhauer, 215 F.3d 340, 350 (3d Cir. 2000) ("the emphatic, non-permissive nature of the [statutory] language ... suggests that the time limitation at issue cannot be equitably tolled"). We find it implausible that Congress would have wanted the courts to expand the statute's limitation period whenever equitable concerns were present. See United States v. Beggerly, 524 U.S. 38, 48, 141 L. Ed. 2d 32, 118 S. Ct. 1862 (1998) ("Equitable tolling is not permissible where it is inconsistent with the text of the relevant statute."). Second, § 1395ww(d)(10)(C)(iii)(I) requires the Board to decide a reclassification request within a strict 180-day time frame in order to avoid eroding HCFA's ability to incorporate the final rates into the wage-index revisions and budget-neutral adjustments. Reading an "equitable tolling" exception into the statute would also create "serious administrative problems" for the agency. Brockamp, 519 U.S. at 353. Therefore, we conclude that equitable tolling is not available to Jordan in this case.

III.

For the foregoing reasons, we affirm the district court's dismissal of Jordan's complaint for lack of subject matter jurisdiction.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION 00-CV-10693-RWZ

JORDAN HOSPITAL, INC.

v.

DONNA E. SHALALA, ET AL.

MEMORANDUM OF DECISION

March 21, 2001

ZOBEL, D.J.

Plaintiff Jordan Hospital is one of many hospitals nationwide which receive reimbursements from the Health Care Financing Administration ("HCFA") of the Department of Health and Human Services ("HHS") for inpatient medical care provided to Medicare patients. Because wage costs incurred by the participating hospitals vary, the HCFA's Prospective Payment System groups hospitals by geographic area, and calculates an annual wage index for each area that is used in reimbursement calculations. The wage index for an area is based upon actual wage costs reported by hospitals in that area several years prior to when the new index is calculated. If a hospital's average hourly wage costs are higher than the wage index for the area in which it is physically situated, it may apply to be treated

as if it were located in a neighboring area ("reclassification"), so long as its average hourly wage costs are sufficiently close to that area's higher wage index. Reimbursements follow the Federal government's fiscal year of October 1 to September 30. Applications for reclassification for a particular fiscal year are due 13 months before that fiscal year begins; thus an application for reclassification for fiscal year 2000 would have been due September 1, 1998. Reclassification applications rely upon the wage indexes calculated for the fiscal year beginning October 1 of the year the application is submitted, and such wage indexes must be enacted by August 1 of that year.

Reclassification applications are heard by the Medicare Geographical Classification Review-Board ("MGCRB") within the HCFA. A hospital dissatisfied with an MGCRB decision may request review by the Administrator of HCFA, which becomes the final decision of the Secretary of HHS. Congress provided by statute that "[t]he decision of the Secretary shall be final and shall not be subject to judicial review." 42 U.S.C. § 1395ww(d)(10)(C)(iii)(II). See also, 42 C.F.R.412.278(f)(3) & (4). Despite this statutory bar to judicial review of individual MGCRB reclassification decisions, Federal courts do have subject matter jurisdiction to review the legality of the regulations, procedures and practices pursuant to which reclassification decisions are made. Parkview Medical Associates v. Shalala, 158 F.3d 146, 148 (D.C. Cir. 1998); Skagit County Public Hosp. Dist. No. 2 v. Shalala, 80 F.3d 379, 386 (9th Cir. 1996); Universal Health Services of McAllen, Inc. v. Sullivan, 770 F. Supp. 704, 710 (D.D.C. 1991). See also Debois Regional Medical Center v. Shalala, No. 94-154J, 1996 WL 636137 (W.D. Pa. Sept. 3, 1996), aff'd 118 F.3d 1575 (3rd Cir. 1997).

Plaintiff is located in the Boston, Massachusetts, area but has regularly applied for reclassification to the Barnstable-Yarmouth area so as to benefit from that area's higher wage

index. Plaintiff did not, however, apply for reclassification for FY 2000 by the statutory filing deadline of September 1, 1998. It is undisputed that Plaintiff did not do so because according to the FY 1999 wage index, published in final form at 63 Fed. Reg. 40954 (July 31, 1998), Plaintiffs average hourly wage costs were not sufficiently close to the higher wage index for Bamstable-Yârmouth. In March 1999, when FY 1999 was nearly half over, and when the deadline for reclassification applications for FY 2000 was more than six months past, Cape Cod Hospital in the BarnstableYarmouth area reported that it had reported incorrectly high wage costs for FY 1995, as a result of which the FY 1999 wage index for Barnstable-Yarmouth had been inflated. Plaintiff learned of this in June 1999, and in August 1999 filed an application for reclassification with the MGCRB. At that point, the final FY 2000 wage index development ofyvhich had taken into account Plaintiffs FY 2000 geographic classification in the Boston area, as well as allowed reclassifications of other hospitals, had already been published. See, 64 Fed. Reg. 41490 (July 30, 1999). It is not disputed that with the corrected data taken into account, Plaintiffs average hourly wage costs were within the proper range to allow reclassification from Boston to YarmouthBarnstable. By its calculation, Plaintiff would have been reimbursed an additional $1.8 million for FY 2000 had it been treated under the Barnstable-Yarmouth wage index.

The MGCRB did not reach the merits of Plaintiffs application, but instead refused the application as untimely. Plaintiff requested review by the HCFA Administrator, who refused to overturn the MGCRB. After exhausting its administrative remedies, Plaintiff brought this action. In Count One, Plaintiff charges that the Defendants' "general policies and procedures for geographic reclassification determinations" violated Plaintiffs Fifth Amendment due process rights because, as a result of those policies and procedures, Defendants refused to consider the merits of Plaintiffs reclassification application. In

Count Two, Plaintiff seeks a declaratory judgment invalidating Defendant HCFA's "rules and regulations relating to the reclassification process," and determining the rights of the parties. In its prayer for relief, Plaintiff requests a finding that Defendants' "rules, regulations, policies and procedures" are invalid on due process grounds, together with an order requiring the MGCRB to consider Plaintiffs application for reclassification for FY 2000.

Defendants now move under Fed. R. Civ. P. 12(b)(1) for dismissal for lack of subject matter jurisdiction, arguing that judicial review is precluded by statute. Although formally a motion under 12(b)(1), Defendants argue further that, even if this court enjoys subject matter jurisdiction, the action should nonetheless be dismissed because the decision of the MGCRB to enforce the statutory deadline was not unreasonable, and because Plaintiffs due process rights were not violated. As Plaintiff correctly notes, these latter arguments are not properly within the scope of a 12(b)(1) motion.

Plaintiffs central argument is that the decision at issue here was not of the type for which judicial review has been barred by Congress. In support of this argument, Plaintiff points to the fact that the substance of the challenged MGCRB action was to enforce the September 1, 1998 application deadline, and that the MGCRB did not address the merits of Plaintiffs application.. Plaintiff points out that HCFA regulations distinguish between MGCRB "decisions" on properly filed applications and MGCRB "dismissals" of late or incomplete applications, see 42 C.F.R. 412.256(c), (d); 42 C.F.R. 412.278(a), and that on its face the statutory bar on judicial review only extends to "decisions." See 42 U.S.C. § 1395ww(d)(10)(C)(iii)(ll). The regulations do not, however, distinguish between these two types of MGCRB action once administrative review by the HCFA Administrator has been

requested; and, under the regulations, the decision of the Administrator with respect to either type of MGCRB action is equally final and immune from judicial review. 42 C.F.R 412.278(f)(3) & (4). This represents a reasonable interpretation by the agency of its statutory mandate, which will not be overturned. Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984). In addition, because the purpose of precluding judicial review of reclassification decisions is to allow the HCFA to meet the complex and time-sensitive task of promulgating annual wage indexes that meet the statutory requirement of "budget neutrality," 42 U.S.C. § 1395ww(d)(8)(D), allowing judicial review of a dismissal such as occurred in this case would defeat the intent of Congress.

Plaintiff goes to great pains to avoid the statutory ban on judicial review by framing its action as a challenge to Defendants' policies and procedures, not a challenge to the decision on its reclassification application. In its complaint, Plaintiff asserts both that the development and review process for the FY 1999 wage index was flawed, and that the HCFA failed to follow its own prescribed process for reviewing information provided by hospitals that was used to develop the FY 1999 index. As a result of these flaws, Plaintiff alleges, Defendants are to blame for not catching Cape Cod Hospital's errors in time to include corrected data in the FY 1999 wage index, which would have led Plaintiff to file a reclassification request for FY 2000 by September 1, 1998. Plaintiff argues that it is seeking only the right to file a late application, rather than a reversal of the MGCRB decision, but this is a distinction without a difference for purposes of the statutory scheme and the Medicare program. Plaintiff in fact does not seek generally applicable injunctive or declaratory relief against any particular rule or practice of Defendants, but asks this court to require Defendants to waive

the September 1, 1998 deadline and to reopen Plaintiffs application. Such relief falls within the statutory ban on judicial review of MGCRB decisions. See Skagit, 80 F.3d at 386-387.

Defendant's motion is allowed. Judgment may be entered for the Defendant.

March 21, 2001
DATE

RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE

APPENDIX C

RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

U.S. CONST. amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1254

Sec. 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1)

By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2)

By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy

42 U.S.C. § 1331

Sec. 1331. Federal question
The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

42 U.S.C. § 1395ww(d)(10)

Sec. 1395ww. Payments to hospitals for inpatient hospital services

(d) Inpatient hospital service payments on basis of prospective rates; Medicare Geographical Classification Review Board

o(10)

- (A) There is hereby established the Medicare Geographic Classification Review Board (hereinafter in this paragraph referred to as the "Board").
- (B)
  - (i) The Board shall be composed of 5 members appointed by the Secretary without regard to the provisions of title 5, governing appointments in the competitive service. Two of such members

shall be representative of subsection (d) hospitals located in a rural area under paragraph (2)(D). At least 1 member shall be knowledgeable in the field of analyzing costs with respect to the provision of inpatient hospital services.

(ii) The Secretary shall make initial appointments to the Board as provided in this paragraph within 180 days after December 19, 1989.

(C)

(i) The Board shall consider the application of any subsection (d) hospital requesting that the Secretary change the hospital's geographic classification for purposes of determining for a fiscal year -

(I) the hospital's average standardized amount under paragraph (2)(D), or

(II) the factor used to adjust the DRG prospective payment rate for area differences in hospital wage levels that applies to such hospital under paragraph (3)(E).

(ii) A hospital requesting a change in geographic classification under clause (i) for a fiscal year shall submit its application to the Board not later than the first day of the 13-month period ending on September 30 of the preceding fiscal year.

(iii)

(I) The Board shall render a decision on an application submitted under clause (i) not later than 180 days after the deadline referred to in clause (ii).

(II) Appeal of decisions of the Board shall be subject to the provisions of section 557b[6] of title 5. The Secretary shall issue a decision on such an appeal not later than 90 days after the date on which the appeal is filed. The decision of the Secretary shall be final and shall not be subject to judicial review.

(D)

(i) The Secretary shall publish guidelines to be utilized by the Board in rendering decisions on applications submitted under this paragraph, and shall include in such guidelines the following:

(I) Guidelines for comparing wages, taking into account (to the extent the Secretary determines appropriate) occupational mix, in the area in which the hospital is classified and the area in which the hospital is applying to be classified.

(II) Guidelines for determining whether the county in which the hospital is located should be treated as being a part of a particular Metropolitan Statistical Area.

(III) Guidelines for considering information provided by an applicant with respect to the effects of the hospital's geographic classification on access to inpatient hospital services by medicare beneficiaries.

(IV) Guidelines for considering the appropriateness of the criteria used to define New England County Metropolitan Areas.

(ii) Notwithstanding clause (i), if the Secretary uses a method for making adjustments to the DRG prospective payment rate for area differences in hospital wage levels under paragraph (3)(E) that is not based on the use of Metropolitan Statistical Area classifications, the Secretary may revise the guidelines published under clause (i) to the

extent such guidelines are used to determine the appropriateness of the geographic area in which the hospital is determined to be located for purposes of making such adjustments.

- (iii) Under the guidelines published by the Secretary under clause (i), in the case of a hospital which has ever been classified by the Secretary as a rural referral center under paragraph (5)(C), the Board may not reject the application of the hospital under this paragraph on the basis of any comparison between the average hourly wage of the hospital and the average hourly wage of hospitals in the area in which it is located.
- (iv) The Secretary shall publish the guidelines described in clause (i) by July 1, 1990.
- (E)
  - (i) The Board shall have full power and authority to make rules and establish procedures, not inconsistent with the provisions of this subchapter or regulations of the Secretary, which are necessary or appropriate to carry out the provisions of this paragraph. In the course of any hearing the Board may administer oaths and affirmations. The provisions of subsections (d) and (e) of section 405 of this title

    with respect to subpenas shall apply to the Board to the same extent as such provisions apply to the Secretary with respect to subchapter II of this chapter.
  - (ii) The Board is authorized to engage such technical assistance and to receive such information as may be required to carry out its functions, and the Secretary shall, in addition, make available to the Board such secretarial, clerical, and other assistance as the Board may require to carry out its functions.
- (F)
  - (i) Each member of the Board who is not an officer or employee of the Federal Government shall be compensated at a rate equal to the daily equivalent of the annual rate of basic pay prescribed for grade GS-18 of the General Schedule under section 5332 of title 5 for each day

(including travel time) during which such member is engaged in the performance of the duties of the Board. Each member of the Board who is an officer or employee of the United States shall serve without compensation in addition to that received for service as an officer or employee of the United States.

(ii) Members of the Board shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, while away from their homes or regular places of business in the performance of services for the Board.

42 C.F.R. § 412.230

Sec. 412.230 Criteria for an individual hospital seeking redesignation to another rural area or an urban area.

Criteria and Conditions for Redesignation

(a) General. (1) Purpose. Except as provided in paragraph (a)(5) of this section, an individual hospital may be redesignated from a rural area to an urban area, from a rural area to another rural area, or from an urban area to another urban area for the purposes of using the other area's standardized amount for inpatient operating costs, wage index value, or both.

(2) Proximity. Except as provided in paragraph (a)(3) of this section, to be redesignated to another rural area or an urban area, a hospital must demonstrate a close proximity to the area to which it seeks redesignation by meeting the criteria in paragraph (b) of this section, and submitting data requested under paragraph (c) of this section.

(3) Special rules for sole community hospitals and rural referral centers. To be redesignated under the special rules in this paragraph, a hospital must be a sole community hospital or a rural referral center as of the date of the MGCRB's review.

(i) A hospital that is a rural referral center, a sole community hospital, or both does not have to demonstrate a close proximity to the area to which it seeks redesignation.

(ii) If a hospital that is a rural referral center, a sole community hospital, or both qualifies for urban redesignation, it is redesignated to the urban area that is closest to the hospital. If the hospital is closer to another rural area than to any urban area, it may seek redesignation to either the closest rural or the closest urban area.

(iii) If a sole community hospital or rural referral center loses its special status as a result of redesignation, the hospital is considered to retain its special status for the purpose of applicability of the special rules in paragraph (a)(3) of this section.

(iv) A hospital that is redesignated under paragraph (a)(3) of this section may not be redesignated in the same fiscal year under paragraph (a)(2) of this section.

(4) Application of criteria. In applying the numeric criteria contained in Secs. 412.230(b)(1) and (2), (d)(2), (e)(1)(iii), and (e)(l)(iv) (A) and (B), rounding of numbers to meet the mileage or qualifying percentage standard is not permitted. (5) Limitations on redesignation. The following limitations apply to redesignation:

(i) An individual hospital may not be redesignated to another area for purposes of the wage index if the pre-reclassified average hourly wage for that area is lower than the pre-reclassified average hourly wage for the area in which the hospital is located.

(ii) For redesignations effective in fiscal years 1997 and 1998 and 2002 and thereafter, a hospital may not be redesignated for purposes of the standardized amount if the area to which the hospital seeks redesignation does not have a higher standardized amount than the standardized amount the hospital currently receives.

(iii) A hospital may not be redesignated to more than one area.

(iv) An urban hospital that has been granted redesignation as rural under Sec. 412.103 cannot receive an additional reclassification by the MGCRB based on this acquired rural status as long as such redesignation is in effect.

(v) Beginning with wage index reclassification applications for FY 2003, if a hospital is already reclassified to a given geographic area for wage index purposes for a 3-year period, and submits an application for reclassification to the same area for either the second or third year of the 3-year period, that application will not be approved.

(b) Proximity criteria. A hospital demonstrates a close proximity with the area to which it seeks redesignation if one of the following conditions applies:

(1) The distance from the hospital to the area is no more than 15 miles for an urban hospital and no more than 35 miles for a rural hospital.

(2) At least 50 percent of the hospital's employees reside in the area.

(c) Appropriate proximity data. For redesignation to an area, the hospital must submit appropriate data relating to its proximity to that area.

(1) To demonstrate proximity to the area, the hospital must submit evidence of the shortest route over improved roads to the area and the distance of that route.

(2) For employee address data, the hospital must submit current payroll records that include information that establishes the home addresses by zip code of its employees.

(d) Use of an area's standardized amount for inpatient operating costs. (1) Criteria. To receive an area's standardized amount for inpatient operating costs, a hospital must demonstrate that its incurred costs are more comparable to the amount it would be paid if it were reclassified than the amount it would be paid under its current classification, and that it has the necessary geographic relationship (as specified in paragraphs (a) and (b) of this section) with the area to which it seeks redesignation.

(2) Demonstrating comparable costs. A hospital demonstrates that its costs are more comparable to the amount it would be paid if it were reclassified if the hospital's case mix adjusted cost per discharge is at least equal to its current rate plus 75 percent of the difference between that rate and the rate it would receive if it were reclassified.

(3) Appropriate cost data. For a standardized amount for inpatient operating costs change, the hospital must submit appropriate data as follows:

(i) For hospital-specific data, the hospital must provide data from its most recently settled and most recently filed cost report.

(ii) For data on other hospitals, the hospital must base its application on the most recent revisions to the prospective payment rates for inpatient operating costs, as published in the Federal Register.

(e) Use of urban or other rural area's wage index--(1) Criteria for use of area's wage index. Except as provided in paragraphs (e)(3) and (e)(4) of this section, to use an area's wage index, a hospital must demonstrate the following:

(i) The hospital's incurred wage costs are comparable to hospital wage costs in an urban or other rural area;

(ii) The hospital has the necessary geographic relationship as specified in paragraphs (a) and (b) of this section;

(iii) One of the following conditions apply:

(A) With respect to redesignations for Federal fiscal year 1994 through 2001, the hospital's average hourly wage is at least 108 percent of the average hourly wage of hospitals in the area in which the hospital is located; or

(B) With respect to redesignations for Federal fiscal year 2002 and later years, the hospital's average hourly wage is, in the case of a hospital located in a rural area, at least 106 percent, and, in the case of a hospital located in an urban area, at least 108 percent of the average hourly wage of hospitals in the area in which the hospital is located; and

(iv) One of the following conditions apply:

(A) For redesignations effective before fiscal year 1999, the hospital's average hourly wage weighted for occupational categories is at least 90 percent of the average hourly wages of hospitals in the area to which it seeks redesignation.

(B) With respect to redesignations for fiscal year 1994 through 2001, the hospital's average hourly wage is equal to at least 84 percent of the average hourly wage of hospitals in the area to which it seeks redesignation.

(C) With respect to redesignations for fiscal year 2002 and later years, the hospital's average hourly wage is equal to, in the case of a hospital located in a rural area, at least 82 percent, and in the case of a hospital located in an urban area, at least 84 percent of the average hourly wage of hospitals in the area to which it seeks redesignation.

(2) Appropriate wage data. For a wage index change, the hospital must submit appropriate wage data as follows:

(i) For redesignations effective through FY 2002:

(A) For hospital-specific data, the hospital must provide data from the CMS hospital wage survey used to construct the wage index in effect for prospective payment purposes during the fiscal year prior to the fiscal year for which the hospital requests reclassification.

(B) For data for other hospitals, the hospital must provide data concerning the average hourly wage in the area in which the hospital is located and the average hourly wage in the area to which the hospital seeks reclassification. The wage data are taken from the CMS hospital wage survey used to construct the wage index in effect for prospective payment purposes during the fiscal year prior to the fiscal year for which the hospital requests reclassification.

(C) If the hospital is requesting reclassification under paragraph (e)(1)(iv)(B) of this section, the hospital must provide occupational- mix data to demonstrate the average occupational mix for each employment category in the area to which it seeks reclassification. Occupational- mix data can be obtained from surveys conducted by the American Hospital Association.

(ii) For redesignations effective beginning FY 2003:

(A) For hospital-specific data, the hospital must provide a weighted 3-year average of its average hourly wages using data from the CMS hospital wage survey used to construct the wage index in effect for prospective payment purposes.

(B) For data for other hospitals, the hospital must provide a weighted 3-year average of the average hourly wage in the area in which the hospital is located and a weighted 3-year average of the average hourly wage in the area to which the hospital seeks reclassification. The wage data are taken from the CMS hospital wage survey used to construct the wage index in effect for prospective payment purposes.

(3) Rural referral center exception. If a hospital was ever a rural referral center, it does not have to demonstrate that it meets the criterion set forth in paragraph (e)(1)(iii) of this section concerning its average hourly wage.

(4) Special dominating hospital exception. The requirements of paragraph (e)(1)(i) and (e)(1)(iii) of this section do not apply if a hospital meets the following criteria:

(i) Its average hourly wage is at least 108 percent of the average hourly wage of all other hospitals in the area in which the hospital is located.

(ii) It pays at least 40 percent of the adjusted uninflated wages in the MSA.

(iii) It was approved for redesignation under this paragraph (e) for each year from fiscal year 1992 through fiscal year 1997.

42 C.F.R. § 412.278

Sec. 412.278 Administrator's review.

(a) Hospitals requests for review. A hospital or group of hospitals dissatisfied with the MGCRB's decision regarding its geographic designation may request the Administrator to review the MGCRB decision. (A hospital or group of hospitals may also request that the Administrator review the MGCRB's dismissal of an application as untimely filed or incomplete, as provided in Sec. 412.256(d).)

(b) Procedures for hospital's request for review. (1) The hospital's request for review must be in writing and sent to the Administrator, in care of the Office of the Attorney Advisor. The

request must be received by the Administrator within 15 days after the date the MGCRB issues its decision. A request for Administrator review filed by facsimile (FAX) or other electronic means will not be accepted. The hospital must also mail a copy of its request for review to CMS's Office of Payment Policy.

(2) The request for review may contain proposed findings of fact and conclusions of law, exceptions to the MGCRB's decision, and supporting reasons therefor.

(3) Within 15 days of receipt of the hospital's request for review, CMS may submit to the Administrator, in writing, with a copy to the party, comments and recommendations concerning the hospital's submission.

(4) Within 10 days of receipt of CMS's submission, the hospital may submit in writing, with a copy to CMS, a response to the Administrator.

(c) Discretionary review by the Administrator. (1) The Administrator may, at his or her discretion, review any final decision of the MGCRB.

(2) The Administrator promptly notifies the hospital that he or she has decided to review a decision of the MGCRB. The notice of review indicates the particular issues to be considered and includes copies of any comments submitted to the Administrator by CMS staff concerning the MGCRB decision.

(3) Within 15 days of the receipt of the Administrator's notice of review, the hospital may submit a response in writing to the Administrator, with a copy of CMS.

(d) Criteria for discretionary review. In deciding whether to review an MGCRB decision, the Administrator normally considers whether it appears that any of the following situations apply:

(1) The MGCRB made an erroneous interpretation of law, regulation, or CMS Ruling.

(2) The MGCRB's decision is not supported by substantial evidence.

(3) The case presents a significant policy issue having a basis in law and regulations, and review is likely to lead to issuance of a CMS Ruling or other directive needed to clarify a provision in the law or regulations.

(4) The decision of the MGCRB requires clarification, amplication, or an alternative legal basis.

(5) The MGCRB has incorrectly extended its authority to a degree not provided for by law, regulation, or CMS Ruling.

(e) Communication procedures. All communications between CMS staff and the Administrator concerning the Administrator's review of an MGCRB decision must be in writing. As specified in paragraphs (b) and (c) of this section, copies of comments by CMS staff are sent to applicant hospitals within 15 days of receipt of a hospital's request for review, or, in cases in which the Administrator decides to review a case at his or her discretion, are included with the Administrator's notice of review. In the event there are additional communications between CMS staff and the Administrator concerning MGCRB decisions reviewed by the Administrator under paragraphs (b) or (c) of this section, CMS furnishes copies of the communications to the hospital or group of hospitals.

(f) Administrator's decision. (1) The Administrator may not receive or consider any new evidence and must issue a decision based only upon the record as it appeared before the MGCRB and comments submitted under paragraphs (b)(2), (b)(3), (b)(4), (c)(2), and (c)(3) of this section.

(2) The Administrator issues a decision in writing to the party with a copy to CMS--

(i) Not later than 90 days following receipt of the party's request for review; or

(ii) Not later than 105 days following issuance of the MGCRB decision in the case of review at the discretion of the Administrator.

(3) The Administrator's decision issued under Sec. 412.278(a) or (c) is the final Departmental decision, unless it is amended under Sec. 412.278(g). The final Departmental decision is not subject to judicial review.

(4) The Administrator's decision is not subject to judicial review.

(g) Amendment of Administrator decision--(1) Hospital's request for amendment. The hospital may request the Administrator to amend the decision for the limited purpose of correcting mathematical or computational errors, or to correct the decision if the evidence that was considered in making the decision clearly shows on its face that an error was made. The following procedure is followed:

(i) The hospital's request for amendment must be received by the Administrator within 10 days after the date the Administrator issues a decision. The request for amendment must be in writing, with a copy to CMS.

(ii) The Administrator promptly reviews the hospital's request and amends the decision, if necessary, within 5 days following receipt of the hospital's request for amendment.

(2) Discretionary review by the Administrator. Within 15 days following the issuance of the Administrator's decision, the Administrator, at his or her discretion, may amend the decision to correct mathematical or computational errors, or to correct the decision if the evidence that was considered in making the decision

clearly shows on its face that an error was made. The Administrator's amended decision is final and is not subject to judicial review.

60 FR 45778, *
FEDERAL REGISTER

Vol. 60, No. 170
Rules and Regulations

DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS)

Health Care Financing Administration (CFA)

42 CFR Parts 412, 413, 424, 485, and 489

[BPD-825-FC]

RIN 0938-AG95

Medicare Program; changes to the Hospital Inpatient Prospective Payment Systems and Fiscal Year 1996 Rates

60 FR 45778

DATE: Friday, September 1, 1995

ACTION: Final rule with comment period.

* * *

[*45792]

III. Changes to the Hospital Wage Index

A. Background

Section 1886(d)(3)(E) of the Act requires that, as part of the methodology for determining prospective payments to hospitals, the Secretary must adjust the standardized amounts "for area differences in hospital wage levels by a factor (established by the Secretary) reflecting the relative hospital wage level in the

geographic area of the hospital compared to the national average hospital wage level." In accordance with the broad discretion conferred by this provision, we currently define hospital labor market areas based on the definitions of Metropolitan Statistical Areas (MSAs) issued by the Office of Management and Budget (OMB). In addition, as discussed below, we adjust the wage index to take into account the geographic reclassification of hospitals in accordance with sections 1886(d)(8)(B) and 1886(d)(10) of the Act.

Section 1886(d)(3)(E) of the Act also requires that the wage index be updated annually beginning October 1, 1993. This section further provides that the Secretary base the update on a survey of wage and wage-related costs of short-term, acute care hospitals. The survey should measure, to the extent feasible, the earnings and paid hours of employment by occupational category and must exclude data with respect to the wages and wage-related costs incurred in furnishing skilled nursing services.

For determining prospective payments to hospitals in FY 1996, the wage index is based on the data collected from the Medicare cost reports submitted by short-term, acute care hospitals for cost reporting periods beginning in FY 1992 (that is, cost reporting periods beginning on or after October 1, 1991 and before October 1, 1992). The FY 1996 wage index includes wages and salaries paid by a hospital, home office salaries, fringe benefits, and certain contract labor costs. The current computation for the wage index excludes salaries and wages associated with nonhospital-type services, such as skilled nursing facility services, home health agency services, or other subprovider components that are not subject to the prospective payment system.

As discussed in detail below, we proposed to use updated wage data to construct the wage index as required by section 1886(d)(3)(E) of the Act. Set forth below is a discussion of that update as well as a discussion of other wage index issues. In addition, we proposed to change certain guidelines for hospital reclassification used by the Medicare Geographic Classification Review Board (MGCRB). That change is discussed in section III.E of this preamble.

B. FY 1996 Wage Index Update

* * *

[*45793]

* * *

Comment: One commenter noted that the wage index for seven out of eight MSAs in one State decreased between FY 1995 and the proposed FY 1996 values while other areas of the country experienced significant increases. The Commenter suggested that HCFA review in detail those MSAs that experience significant increases in their wage index values from the prior year in order to maintain consistency and equity of the payment system.

Response: HCFA does review the percent change in the updated wage index from the Prior year wage index, by MSA and by urban and rural hospital location. In addition, we review the wage data for any area that experiences a wage index change of 10 percent or more to determine the reason for the fluctuation. When necessary, we contact the appropriate fiscal intermediary to ensure the validity of the data or to obtain an explanation for the change. We note that none of the MSAs referred to by the commenter experienced a change of 10 percent or more. Therefore, they were not subject to any special review.

We also analyze the impact of the updated wage index on hospitals using categories such as census division, teaching status, and geographic reclassification status. This impact analysis is located in Section VI.C of Appendix A to this final rule. We include the impact analysis in both the proposed and final rules.

62 FR 45966, *

FEDERAL REGISTER

Vol. 62, No. 168

Rules and Regulations

DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS)

Health Care Financing Administration (HCFA)

42 CFR Parts 400, 409, 410, 411, 412, 413, 424, 440, 485, 488, 489, and 498

[BPD-878-FC]

RIN 0938-AH55

Medicare Program; Changes to the Hospital Inpatient Prospective Payment Systems and Fiscal Year 1998 Rates

Part IV

62 FR 45966

DATE: Friday, August 29, 1997

ACTION: Final rule with comment period.

* * *

[*45984]

III. Changes to the Hospital Wage Index and Medicare Geographic Reclassification Guidelines

A. Background

Section 1886(d)(3)(E) of the Act requires that, as part of the methodology for determining prospective payments to hospitals, the Secretary must adjust the standardized amounts "for area differences in hospital wage levels by a factor (established by the Secretary) reflecting the relative hospital wage level in the

geographic area of the hospital compared to the national average hospital wage level." In accordance with the broad discretion conferred under the Act, we currently define hospital labor market areas based on the definitions of Metropolitan Statistical Areas (MSAs), Primary MSAs (PMSAs), and New England County Metropolitan Areas (NECMAs) issued by the Office of Management and Budget (OMB). OMB also designates Consolidated MSAs (CMSAs). A CMSA is a metropolitan area with a population of one million or more, comprised of two or more PMSAs (identified by their separate economic and social character). For purposes of the hospital wage index, we use the PMSAs rather than CMSAs since they allow a more precise breakdown of labor costs. If a metropolitan area is not designated as part of a PMSA, we use the applicable MSA. Rural areas are areas outside a designated MSA, PMSA, or NECMA.

In the proposed rule, we noted that, effective April 1, 1990, the term Metropolitan Area (MA) replaced the term Metropolitan Statistical Area (MSA) (which had been used since June 30, 1983) to describe the set of metropolitan areas comprised of MSAs, PMSAs, and CMSAs. The terminology was changed by OMB in the March 30, 1990 Federal Register to distinguish between the individual metropolitan areas known as MSAs and the set of all metropolitan areas (MSAs, PMSAs, and CMSAs) (55 FR 12154). For purposes of the prospective payment system, we will continue to refer to these areas as MSAs.

Section 1886(d)(3)(E) of the Act also requires that the wage index be updated annually beginning October 1, 1993. Furthermore, this section provides that the Secretary base the update on a survey of wages and wage-related costs of short-term, acute care hospitals. The survey should measure, to the extent feasible, the earnings and paid hours of employment by occupational category, and must exclude the wages and wage-related costs incurred in furnishing skilled nursing services. We also adjust the wage index, as discussed below in section III.B.3, to take into account the geographic reclassification of hospitals in accordance with sections 1886(d)(8)(B) and 1886(d)(10) of the Act.

B. FY 1998 Wage Index Update

The final FY 1998 wage index in section V. of the Addendum (effective for hospital discharges occurring on or after October 1, 1997 and before October 1, 1998) is based on the data collected from the Medicare cost reports submitted by hospitals for cost reporting periods beginning in FY 1994 (the FY 1997 wage index was based on FY 1993 wage data). We used the same categories of data that were used in the FY 1997 wage index. Therefore, the FY 1998 wage index reflects the following:

. Total salaries and hours from short-term, acute care hospitals.

. Home office costs and hours.

. Fringe benefits associated with hospital and home office salaries.

. Direct patient care contract labor costs and hours.

. The exclusion of salaries and hours for nonhospital type services such as skilled nursing facility services, home health services, or other subprovider components that are not subject to the prospective payment system.

We proposed to calculate a separate Puerto Rico-specific wage index to be applied to the Puerto Rico standardized amount. We stated that this wage index would be calculated in the same manner as the national wage index described below, but will be based solely on Puerto Rico's data. We received several comments supporting the new Puerto Rico-specific wage index. We are implementing that change and revising § 412.210(e) accordingly.

We did not propose any changes in the reporting of hospital wage index data, but we received numerous comments regarding the FY 1995 wage data, which will not be used until we develop the FY 1999 wage index. The Medicare cost report for reporting periods beginning during FY 1995 included several changes to the Worksheet S-3 that will allow us to analyze further refinements to the wage index. Among those changes are the separate reporting of all salary costs for physicians (including teaching physicians), residents, and certified registered nurse anesthetists (CRNAs). In addition, we collected overhead cost data by cost center in order to

analyze the possibility of excluding overhead costs attributable to skilled nursing facilities and other excluded areas from the wage index. These comments are discussed in detail below.

Comment: Two commenters stated that we should exclude physician salaries (as recommended by the Medicare Technical Advisory Group); one suggested that we should immediately exclude these costs using information from the Worksheet A-8-2 of the Medicare cost report. Alternatively, a few commenters suggested that we should include contracted Part A physician salaries for those States in which hospitals are prohibited from employing physicians. Several commenters are concerned that the removal of teaching physician and resident salaries would redistribute revenues from large metropolitan areas with large teaching programs to areas that support medical education to a lesser extent. The commenters noted that recent legislation revising the payments for disproportionate share and the indirect medical education adjustments (sections 4403 and 4621 of Public Law 105-33) will further reduce payment for hospitals in major metropolitan areas.

Other commenters suggested that we analyze the impact of excluding the data before making a final decision. Some commenters specifically recommended that we determine whether hospitals that are prohibited from employing physicians are disadvantaged by our current policy, and, if so, that we develop a policy that minimizes the redistribution of revenue and the concentration of losses in particular geographic areas.

Response: These comments relate to the FY 1995 wage data, which we are not using in developing the FY 1998 wage index. We will consider these comments in developing the FY 1999 wage index. Although the deadline for fiscal intermediaries to submit all of the reviewed FY 1995 wage data to HCFA is mid-November 1997, we intend to begin our analysis of these data prior to that time, based on the data that have already been submitted to the Health Care Provider Cost Report Information System (HCRIS). We note that our fundamental objective in administering the wage index is to ensure that it is accurate and fair, and we will evaluate the use of the FY 1995 wage data with that objective in mind.

Regarding the suggestion that we use Worksheet A-8-2 to exclude Part A physician salaries, we noted in the proposed rule (62 FR 29914) that, because the intermediaries had already begun reviewing the FY 1994 cost report and finalizing the Worksheet S-3 data, we did not believe it would be appropriate to revise their instructions and require them to make a change to their procedure. Therefore, we will review and evaluate for the FY 1995 data, which provides for the separate [*45985] reporting of physician salaries when considering appropriate changes in the FY 1999 wage index.

Comment: One hospital association commented that it had analyzed unedited preliminary FY 1995 HCRIS data and concluded that revising our policy to include contracted Part A physician salaries would redistribute current payments by only half of what would result if we changed our policy to exclude all Part A physician and resident salaries. (Currently, we exclude contracted Part A physician salaries, but include similar salaries if the physician is employed by the hospital.) Other commenters noted other data issues that arise using the preliminary FY 1995 HCRIS wage data.

Response: In response to these comments, we would emphasize that the cost report data analyzed by these commenters are very preliminary, and in many cases, have not yet been reviewed by the intermediaries. The data were extracted from the HCRIS Minimum Data Set, which is updated quarterly and becomes more accurate and complete after the deadline for completion of the wage data desk reviews by the intermediaries. We are aware of the need to carefully review these data due to the changes discussed above, and we will work with those in the hospital industry that have taken the initiative to begin to examine the data in order to draw upon their findings while proceeding with our analysis.

Comment: Two commenters stated that wages and wage-related costs for physicians, residents, and CRNAs are not reported separately for FY 1995, but are reported separately for FY 1996. They requested that HCFA postpone its evaluation of the exclusion of these data until the FY 1996 data are available, and that HCFA announce this 1-year delay in the FY 1998 final rule.

Response: We are aware that for the FY 1995 cost reports some hospitals may have reported teaching physicians' salaries with residents' wages, and also did not separately report wage-related costs for physicians, residents, and CRNAs. To address this situation we revised the FY 1996 cost reporting instructions. We will consider the impact of this problem in our FY 1995 data analysis.

Comment: Four commenters disputed the rationale that Part A physician and resident salaries should be excluded from the wage index because these costs are largely paid through Medicare direct graduate medical education payments. They stated that other costs, such as outpatient and general service costs that are allocated to excluded cost centers, are similarly paid outside the prospective payment system, but are included in the wage index calculation.

Response: The FY 1995 revised Worksheet S-3 allows for the separate reporting of direct salaries and hours by general service cost centers as well as physician salaries. We plan to analyze these data to determine the feasibility of allocating general service costs and removing those costs that are associated with excluded areas. Regarding outpatient costs, hospital staff frequently provide services in both the outpatient and inpatient departments, and we believe that the inclusion of outpatient salaries causes little or no distortion to the wage index.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JORDAN HOSPITAL, INC., Plaintiff, v. DONNA E. SHALALA, in her capacity as Secretary of the Department of Health and Human Services, NANCY-ANN MIN DEPARLE, in her capacity as Administrator of the Health Care Financing Administration, and the MEDICARE GEOGRAPHIC CLASSIFICATION REVIEW BOARD, Defendants.	CIVIL ACTION NO. 00-CV-10693

COMPLAINT

Preliminary Statement of Case

1. This is an action against the federal defendants who regulate payments to hospitals which provide inpatient services to Medicare beneficiaries. The federal defendants denied plaintiff Jordan Hospital, Inc. ("Jordan Hospital") its right to participate in a statutory process known as "geographic reclassification" by which defendants commonly allow Jordan Hospital and other hospitals to apply for reclassification to a different geographical region for purposes of using the other area's standardized amount, wage index or both when computing rates of Medicare reimbursement. The result of such geographic reclassification is to increase the amount of Medicare payments to the hospital.

2. Defendants denied Jordan Hospital its right to participate in this process by failing to comply with their statutory obligation to provide accurate data on which hospitals are required to rely in making a determination as to whether they are eligible to apply for geographic reclassification. By failing to provide accurate data, and by failing to detect and correct erroneous data, defendants caused Jordan Hospital to rely in good faith on such erroneous data and thereby determine that it was not eligible for geographic reclassification. As a result, Jordan Hospital was induced to its detriment not to apply in a timely manner for reclassification for federal fiscal year ("fiscal year") 2000.

3. After the deadline for filing reclassification applications expired, Jordan Hospital learned that the data provided by defendants on which it relied was erroneous. Based on subsequently obtained accurate data, Jordan Hospital determined that, in fact, it was eligible for geographic reclassification for fiscal year 2000, and promptly applied for the same. Defendants ruled that Jordan Hospital was prohibited from seeking such reclassification because it had not applied by the deadline, notwithstanding that its failure to do so was caused solely by defendants' failure to provide accurate data and to detect and correct erroneous data on which Jordan Hospital was required to rely and did, in fact, rely. Accordingly, defendants refused to consider Jordan Hospital's application for reclassification and never ruled on its merits.

4. If defendants had provided accurate data, Jordan Hospital would have timely filed its application, defendants would have granted such application, and Jordan Hospital would have received approximately $1.8 million more in Medicare payments for fiscal year 2000 than it will receive without the benefit of the geographic reclassification which it was barred from seeking. As a remedy for these unlawful actions, Jordan Hospital seeks invalidation of the policies and procedures which resulted in defendants' reporting of erroneous data, a reopening of its

application for reclassification for fiscal year 2000 (running from October 1, 1999 through September 30, 2000), and other appropriate relief.

PARTIES

5. Plaintiff Jordan Hospital, Inc. ("Jordan Hospital") is a charitable corporation duly organized under the laws of the Commonwealth of Massachusetts with a principal place of business at 275 Sandwich Street, Plymouth, Massachusetts. Jordan Hospital is licensed to operate an acute care facility hospital with 113 beds and 25 skilled nursing beds.

6. Defendant Donna E. Shalala is the Secretary of the Department of Health and Human Services. In her capacity as Secretary, defendant Shalala is responsible for administration of the health insurance program for persons aged sixty-five and older and for persons with certain disabilities established by Title XVIII of the Social Security Act, 42 U.S.C. § 1395 et seq. ("Medicare program").

7. Defendant Nancy-Ann Min DeParle is the Administrator of the Health Care Financing Administration ("HCFA"). HCFA is the agency within the Department of Health and Human Services responsible for administration of the Medicare program. As the Administrator of HCFA, defendant DeParle is responsible for reviewing and deciding appeals from decisions by defendant Medicare Geographic Classification Review Board.

8. Defendant Medicare Geographic Classification Review Board ("the Board") was established pursuant to 42 U.S.C. § 1395ww(d)(10)(A) and is responsible for reviewing applications made by health care providers participating in the Medicare program seeking reclassification to a different geographical area. 42 U.S.C. § 1395w(d)(10)(C)(i).

JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331.

10. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e)(2) and (3) in that a substantial part of the events giving rise to the Complaint occurred in this District and Jordan Hospital resides in this District.

STATEMENT OF FACTS

11. Jordan Hospital has been a duly certified participating provider of services in the Medicare program since the beginning of the program. 42 U.S.C. § 1395x(u).

12. The Medicare program reimburses participating hospitals for inpatient services on a prospective payment system basis. 42 U.S.C. § 1395ww. As such, hospitals, including Jordan Hospital, receive payments at a predetermined, specific rate rather than for actual costs incurred in providing such inpatient services.

13. The amount of reimbursement that a hospital receives for a given service depends on, among other things, its average standardized amount and the area wage index applicable to the hospital. 42 U.S.C. § 1395ww(d)(10). Both the standardized amount and the applicable wage index are based, in part, on the hospital's geographic location. 42 U.S.C. § 1395ww(d)(2)(D)(i)&(ii).

14. To avoid inequities arising as a result of geographic location, a hospital may submit an application requesting "reclassification" to another geographical area for the purposes of using that area's standardized amount, wage index or both. As such, reclassification allows hospitals to obtain higher reimbursement by qualifying to use a different wage index. 42 U.S.C. § 1395ww(d)(10)(c)(i)(II).

15. In order to obtain reclassification, a hospital participating in the Medicare program must submit an application to the Board demonstrating that it meets the criteria for reclassification set forth in 42 C.F.R. § 412.230(e). Those criteria for reclassification for wage index purposes include, inter alia, that the hospital's average hourly wage is at least 108% of the average hourly wage of hospitals in the area in which the hospital is located, and the hospital's average hourly wage is equal to at least 84% of the average hourly wage of hospitals in the area to which it seeks redesignation. 42 C.F.R. § 412.230(e)(1)(iii) & (iv) (A).

16. An application for reclassification must be submitted to the Board not later than the first day of the thirteen month period ending on September 30 of the preceding fiscal year. 42 U.S.C. § 1395ww(d)(10(C)(ii). For reclassification applicable for fiscal year 2000, which commenced on October 1, 1999, a provider had to submit an application for reclassification on or before September 1, 1998.

17. Jordan Hospital timely filed applications for reclassification based on the wage index from the Boston, Massachusetts area to the Barnstable-Yarmouth, Massachusetts area for fiscal year 1998 and fiscal year 1999 with the Board. Those applications were approved in routine course by the Board.

18. Pursuant to 42 C.F.R. § 412.266, the average hourly wage data necessary to prepare an application for reclassification to the Board is located in the Federal Register. Accordingly, in order to prepare its application for fiscal year 2000 reclassification, Jordan Hospital was required to use the average hourly wage data in the wage index published by HCFA in the July 31, 1998 Federal Register ("fiscal year 1999 wage index"). The fiscal year 1999 wage index was developed by HCFA based on information that it extracted from the fiscal year 1995 cost reports of Medicare participating hospitals.

19. The fiscal year 1999 wage index as reviewed and provided by HCFA in the Federal Register set forth an average hourly wage of $23.40 for the Boston, Massachusetts area in which Jordan Hospital was located. It also set forth an average hourly wage of $31.96 for the Barnstable-Yarmouth, Massachusetts area. Relying on this information as required, Jordan Hospital determined that it did not meet the 108%-84% criteria for reclassification to the Barnstable-Yarmouth, Massachusetts area because its average hourly wage was less than 84% of that of the Barnstable-Yarmouth, Massachusetts average hourly wage. 42 C.F.R. § 412.230(e)(1)(iii) & (iv) (A).

20. In good faith reliance on the information contained in the fiscal year 1999 wage index provided by HCFA, Jordan Hospital did not submit an application for fiscal year 2000 reclassification to the Board by the statutory deadline of September 1, 1998.

21. Subsequently, on or about June 1999, Jordan Hospital learned that Cape Cod Hospital, one of the two hospitals located in the Barnstable-Yarmouth, Massachusetts area, had notified its fiscal intermediary in March 1999 of errors in Cape Cod Hospital's 1994, 1995, 1996 and 1997 cost reports. Those errors included errors related to wages and hours reported for certain years, including 1995. These errors were used to calculate the average hourly wage for the Barnstable-Yarmouth, Massachusetts area for the fiscal year 1999 wage index published by HCFA in the July 31, 1998 Federal Register on which Jordan was required to rely.

22. The revisions reported by Cape Cod Hospital to correct the errors in its 1995 cost report included a decrease in wages reported and an increase in hours reported. With the revisions, the average hourly wage for the Barnstable-Yarmouth, Massachusetts area was reduced to $28.15.

23. These errors significantly impacted the fiscal year 1999 wage index for the Barnstable-Yarmouth, Massachusetts area, which is based in large part on costs reported in 1995 by Cape Cod Hospital. Despite these significant revisions requested, no changes to the fiscal year 1999 wage index for the Barnstable-Yarmouth, Massachusetts area were published or have ever been published by HCFA.

24. Had the information in the fiscal year 1999 wage index published by HCFA in the Federal Register been accurate, Jordan Hospital would have been eligible to seek reclassification based on the wage index to the Barnstable-Yarmouth, Massachusetts area and would have sought such reclassification in a timely manner on the grounds that it would have satisfied the 108%-84% criteria. Jordan Hospital was unable to satisfy this criteria when the erroneous data was used.

25. Based on its experience in receiving reclassifications in prior years from HCFA, if Jordan Hospital had applied it would have been granted such reclassification for fiscal year 2000, and would have thereby received approximately $1.8 million more in Medicare program reimbursement for fiscal year 2000 than it will receive without the benefit of the geographic reclassification to which it was entitled. This estimated $1.8 million shortfall represents approximately eight percent (8%) of the total Medicare reimbursement which Jordan Hospital will receive for fiscal year 2000.

26. After learning of the errors relating to Cape Cod Hospital's cost report, on or about August 17, 1999, Jordan Hospital submitted an Individual Hospital Application for Geographic Reclassification Effective Federal Fiscal Year 2000 ("Application") to the Board. A true and complete copy of that Application is attached hereto as Exhibit A.

27. In its Application, Jordan Hospital requested reclassification on the basis of the wage index value 108% and 84%. 42 C.F.R. § 412.230(e)(1)(iv)(A). In its submission, Jordan Hospital informed the Board that the reason the Application was filed after the normal deadline was a result of the significantly erroneous hourly wage data published by HCFA for the benefit of hospitals like Jordan Hospital considering geographic reclassification applications.

28. Notwithstanding this justification for post-deadline filing, one week later, on or about August 24, 1999, the Board dismissed the Application on the grounds that it was not timely filed, and thereby refused to consider the Application on its merits. A true and complete copy of the notice of dismissal is attached hereto as Exhibit B.

29. Jordan Hospital timely appealed the Board's dismissal to the Administrator of HCFA on or about September 7, 1999, and in the appeal reiterated that the reason for the post-deadline submission was the erroneous hourly wage data published by HCFA on which Jordan Hospital had properly relied. A true and complete copy of that appeal is attached hereto as Exhibit C.

30. In a decision issued September 28, 1999, the Administrator of HCFA, acting on behalf of the Secretary, affirmed the Board's dismissal. A true and complete copy of that decision is attached hereto as Exhibit D.

31. By letter dated October 7, 1999, pursuant to 42 C.F.R. § 412.278(g), Jordan Hospital submitted a request to amend the decision to the Administrator of HCFA and again cited the errors in HCFA's data as the reason for the delay in filing the Application. A true and complete copy of that request is attached hereto as Exhibit E.

32. Jordan Hospital's request to amend the decision was denied on or about October 12, 1999 on the grounds that it did not meet the criteria for amending decisions. A copy of that denial is attached hereto as Exhibit F.

33. Defendants have failed and refused to either consider the merits of the Application or to otherwise explain why HCFA's own errors in publishing false data should preclude consideration of Jordan Hospital's Application.

COUNT I - VIOLATION OF DUE PROCESS

34. Jordan Hospital repeats and realleges each and every allegation contained in paragraphs 1 through 33 of the Complaint as if fully set forth herein.

35. The fiscal year 1999 wage index was the first annual wage index subject to a new development and review process. The cost reporting forms for fiscal year 1995 also introduced certain changes including, changes to Worksheet S-3. In addition, the wage data requirements in the fiscal year 1995 cost report, which is the document from which relevant wage information was extracted to develop the fiscal year 1999 wage index, included significant changes.

36. As early as 1997, defendants were on notice of potential problems with the development of the fiscal year 1999 wage index. Interested parties expressed concerns to HCFA regarding the impact of the changes to the 1995 cost reporting forms and the likely confusion and threat of potential errors on the fiscal year 1999 wage index resulting from the revised wage data requirements in the fiscal year 1995 cost report. 62 Fed. Reg. 45966, 45992 (August 29, 1997).

37. Compounding this problem was the adoption of a new, abbreviated review process implemented effective for the development and verification of the fiscal year 1999 wage index.

In 1997, HCFA announced that the wage index development and review process used for the fiscal year 1999 wage index would be modified to require that wage data revisions be requested by hospitals and resolved before the publication of the proposed rule. 62 Fed. Reg. 45966, 45990 (August 29, 1997).

38. The new development and review process adopted by HCFA eliminated the "second review" previously conducted by fiscal intermediaries which had been used to ensure the inclusion and accuracy of all hospitals' wage data during the wage index development process. 62 Fed. Reg. 45966, 45991 (August 29, 1997). The removal of this second level of review by the fiscal intermediaries increased the likelihood of flawed data remaining undetected in the creation of the fiscal year 1999 wage index.

39. In order to ensure the accuracy of the wage index in light of its significance to requests for geographic reclassification, HCFA established a process for developing the fiscal year 1999 wage index and verifying the information contained therein. That process included the following steps:

a. Fiscal intermediaries to conduct desk reviews of hospital wage data and revised data to be transmitted by the fiscal intermediaries to the Health Care Providers Cost Report Information System ("HCRIS"), a division within HCFA;

b. HCFA to release edited wage to the public;

c. Hospitals required to verify the data or submit requests for wage data revisions with supporting documentation by a designated deadline;

d. Fiscal intermediaries required to transmit appropriate revised wage data to HCRIS;

e. HCFA to publish a proposed rule with comment;

f. Final wage data to be made available to the public;

g. Hospitals required to notify HCFA and their fiscal intermediary by a specified deadline that wage data was incorrect due to mishandling of data by the fiscal intermediary or HCFA;

h. HCFA to publish the final rule in the Federal Register; and

i. On October 1, 1998 the final updated wage index for federal fiscal year 1999 to take effect.

62 Fed. Reg. 45966, 45993 (August 29, 1997).

40. HCFA represented, inter alia, to applicants, including Jordan Hospital, that it had conducted "an intensive review of the wage data" submitted in order to identify aberrant data. 63 Fed. Reg. 40954, 40971 (July 31, 1998). In order to ensure the accuracy of the wage index, HCFA has asserted that its practice was to review the

> percentage change in the updated wage index from the prior year wage index, by . . . hospital location. In addition, [HCFA] review[s] the wage data for any area that experiences a wage index change of 10 percent or more to determine the reason for the fluctuation. When necessary, [HCFA] contact[s] the appropriate fiscal intermediary to ensure the validity of the data or to obtain an explanation for the change.

60 Fed. Reg. 45778, 45793 (September 1, 1995).

41. The average hourly wage for the Barnstable-Yarmouth, Massachusetts area in fiscal year 1998 was $28.72 in comparison to the average hourly wage of $31.96 for fiscal year 1999 which was an increase of 11.28%. As such, the difference in the hourly wage data for the Barnstable-Yarmouth, Massachusetts area for fiscal year 1998 to fiscal year 1999 exceeded 10%, and in light of such fluctuation, was subject to review by HCFA to ensure the accuracy of the data.

42. If HCFA had followed its prescribed review process and conducted a review, and had fulfilled its legal responsibility to detect and correct erroneous information, the errors reported by Cape Cod Hospital would have been detected and corrected in a timely manner to allow for the publication of an accurate fiscal year 1999 wage index.

43. At the time that Jordan Hospital made the determination that it did not meet the criteria for reclassification based on its good faith reliance on the accuracy of the fiscal year 1999 wage index, it was unaware of the errors made by Cape Cod Hospital. Moreover, even if Jordan Hospital had been aware of such errors, the geographic reclassification rules and regulations provide that only the reporting hospital may request midyear corrections to the wage index, and even then, under very limited circumstances. 42 C.F.R. § 412.63(w)(2)(i)(A) & (B).

44. The fiscal year 1999 Wage Index was subsequently revised by HCFA after the final version was published. In making this revision, HCFA acknowledged that "certain aspects of the development of the [F]FY 1999 wage index may have led to some confusion among the hospital community." 64 Fed. Reg. 9378, 9378 (February 25, 1999).

45. HCFA noted that a number of factors resulted in the need to revise the fiscal year 1999 wage index, including the number of hospitals contacting it relative to the same types of problems, the changes to the Medicare cost report form for 1995, and the revised timetable for finalizing the wage data.

46. By virtue of the foregoing actions, the general policies and procedures for geographic reclassification determinations related to wage data information adopted and implemented by defendants have denied Jordan Hospital its due process rights under the Fifth and Fourteenth Amendments to the United States Constitution by means which include, though are not limited to, the following:

a) failing to provide and/or follow prescribed procedures for detecting errors in wage data;

b) failing to provide a means by which to ensure that properly submitted data corrections are considered in such determinations; and

c) failing to provide a mechanism pursuant to which applications may be considered when they have not been filed by innocent parties like Jordan Hospital, which justifiably relied in good faith on the information provided by HCFA and prescribed for review by statute, but which is subsequently determined to be erroneous after the deadline for filing applications has expired.

47. As a result of these due process violations, the Board and HCFA have refused to consider Jordan Hospital's Application. If it had been considered, that Application would have been allowed and would have entitled Jordan Hospital to additional Medicare program reimbursements of approximately $1.8 million.

COUNT II - REQUEST FOR DECLARATORY JUDGMENT

48. Jordan Hospital repeats and realleges the allegations contained in paragraphs 1 through 47 of the Complaint as if fully set forth herein.

49. An actual controversy exists between the parties as to whether of Jordan Hospital's Application, which was filed late as a result of its good faith reliance on erroneous information published by HCFA on which Jordan Hospital was required to rely, may be considered.

50. An actual controversy exists between the parties as to whether the defendants' actions and decisions in refusing to consider Jordan Hospital's Application are arbitrary, capricious, an abuse of discretion, contain errors of law, and constitute a violation of Jordan Hospital's due process rights.

51. Jordan Hospital requests that the Court make a determination that HCFA's rules and regulations relating to the reclassification process described herein are invalid, and determine the legal rights of the parties as a result of such invalidity.

REQUEST FOR RELIEF

WHEREFORE, plaintiff Jordan Hospital, Inc. respectfully requests that this Court enter judgment ordering the following relief:

1. Make a determination that defendants' rules, regulations, policies and procedures relating to the development and correction of the wage data index for use in the geographic reclassification process are invalid on the grounds that they are unconstitutional as a deprivation of due process;

2. Enter an order requiring the Board to consider Jordan's Application for Geographic Reclassification for fiscal year 2000; and

3. Award such other relief as this Court deems just and equitable.

JORDAN HOSPITAL, INC.

By its attorneys,

Bruce A. Singal, BBO #464420
Paul M. Barrett, BBO #330870
Lauren E. Duca, BBO #548128
DONOGHUE, BARRETT & SINGAL, P.C.
One Beacon Street, Suite 1320
Boston, Massachusetts 02108
(617) 720-5090

Dated: April 7, 2000

Jordan HOSPITAL

Jordan Hospital's mission is to provide health and wellness services with excellence.

275 Sandwich Street, Plymouth, MA 02360
(508) 746-2001 • TTY (508) 746-8181
Fax (508) 830-1131

August 17, 1999

Medicare Geographic Classification Review Board
P.O. Box 31713
Room C1-09-13
Baltimore, MD 21244-1850

Dear Sir:

Enclosed please find one original and two unbound copies with Documentation of Jordan Hospital's (220060) 1998 "Individual Hospital Application For Geographic Reclassification Effective Federal Fiscal Year 2000". Jordan Hospital is filing this Application at this time because our fiscal intermediary "Associated Hospital Service of Maine" has received documentation correcting errors in the 1995 Average Hourly Wage Data that significantly lowers the 2000 Wage Index for the Barnstable-Yarmouth, Massachusetts Area 0743. Since these changes are not yet published in the Federal Register, we estimated the impact of these changes and include the results as Attachment G-1. We then recalculated the 108% and 84% thresholds showing that Jordan Hospital would qualify in FY 2000.

Should you have any questions or require additional information, please feel free to contact me at (508) 830-2013.

Sincerely,

Michael Corcoran
Director of Reimbursement and Budget

MC/br
Enclosure

cc: Health Care Financing Administration
Plan and Provider Purchasing Policy Group
Division of Acute Care
7500 Security Boulevard
Mail Stop C4-07-07
Baltimore, MD 21244-1850
RE: MGCRB Application

EXHIBIT A

08/23/99 12:42 TX/RX NO. 1100 P02

BEST AVAILABLE COPY

MEDICARE GEOGRAPHIC CLASSIFICATION REVIEW BOARD

1998 INDIVIDUAL HOSPITAL APPLICATION FOR

GEOGRAPHIC RECLASSIFICATION EFFECTIVE FEDERAL FISCAL YEAR 2000

PLEASE READ INSTRUCTIONS BEFORE COMPLETING THIS APPLICATION

THIS APPLICATION MUST BE COMPLETED AND RECEIVED BY THE MGCRB BY 5:00 P.M. EST, SEPTEMBER 1, 1998. FAILURE TO COMPLY WILL RESULT IN DISMISSAL.

PRINT IN INK OR TYPE WHEN COMPLETING THIS APPLICATION.

I. HOSPITAL INFORMATION

1. NAME OF HOSPITAL: Jordan Hospital

2. MEDICARE PROVIDER NUMBER: 22-0060

MEDICARE NATIONAL PROVIDER IDENTIFIER (IF AVAILABLE):

3. STREET ADDRESS: 275 Sandwich Street

Plymouth, Mass ZIP CODE 02360

4. NAME OF THE COUNTY IN WHICH THE HOSPITAL IS LOCATED:

Plymouth

5. MAILING ADDRESS AND CONTACT NAME AND TELEPHONE NUMBER FOR ALL COMMUNICATIONS REGARDING THE APPLICATION:

ORGANIZATION:

NAME: Michael Corcoran

ADDRESS: 275 Sandwich Street

Plymouth, Mass 02360

TELEPHONE NUMBER: 508-830-2013

IF THE INFORMATION ENTERED IS FOR A REPRESENTATIVE, PROVIDE AT ATTACHMENT A A LETTER FROM THE HOSPITAL DESIGNATING THE REPRESENTATIVE.

II. RECLASSIFICATION REQUEST

6. CIRCLE THE RECLASSIFICATION AND CRITERIA CATEGORY USED FOR THE APPLICATION:

   (A) WAGE INDEX VALUE - 108 AND 84 PERCENT

   B. WAGE INDEX VALUE - DOMINATING HOSPITAL EXCEPTION

   C. STANDARDIZED AMOUNT

7. SEEKS RECLASSIFICATION FROM: Boston Massachusetts #1123
   (SHOW THE NAME AND IDENTIFICATION NUMBER (SEE TAB 1) FOR THE STATE, MSA, OR NECMA.)

   SEEKS RECLASSIFICATION TO: Barnstable-Yarmouth Massachusetts #0743
   (SHOW THE NAME AND IDENTIFICATION NUMBER (SEE TAB 1) FOR THE STATE, MSA OR NECMA.)

III. GENERAL INFORMATION

8. IS THE HOSPITAL ALSO A MEMBER OF A GROUP RECLASSIFICATION REQUEST?

   YES ___ NO X

9. IF "YES" TO 8., ENTER THE NAME OF THE COUNTY OR NECMA IN WHICH THE GROUP IS LOCATED:

   _____

10. INDICATE WHETHER THE HOSPITAL IS CURRENTLY CLASSIFIED AS A:

    A. SOLE COMMUNITY HOSPITAL YES ___ NO X

       IF "YES," ATTACH A CURRENT LETTER FROM THE FISCAL INTERMEDIARY OR HCFA REGIONAL OFFICE SUPPORTING THE HOSPITAL'S STATUS UNDER ATTACHMENT B.

    B. HAS THE HOSPITAL LOST ITS DESIGNATION AS A SOLE COMMUNITY HOSPITAL DUE TO AN MGCRB RECLASSIFICATION IN A PREVIOUS YEAR?

       YES ___ NO X

       IF "YES," IDENTIFY THE DATE STATUS WAS LOST: _____
       ATTACH THE FISCAL INTERMEDIARY OR HCFA REGIONAL OFFICE LETTER INDICATING WHEN STATUS WAS LOST UNDER ATTACHMENT C.

11. INDICATE WHETHER THE HOSPITAL HAS EVER BEEN CLASSIFIED AS A:

    RURAL REFERRAL CENTER YES ___ NO X

    IF "YES," ATTACH A LETTER FROM THE FISCAL INTERMEDIARY OR HCFA REGIONAL OFFICE SUPPORTING THE HOSPITAL'S STATUS UNDER ATTACHMENT B.

12. INDICATE PRIOR YEAR CASE NUMBER(S): 61a

92C _____ 91C _____ 90C _____ 89C _____

88C _____ 87C _____ 86C _____ 85C _____

IV. RECLASSIFICATION REQUEST UNDER SPECIAL ACCESS RULES FOR SOLE COMMUNITY HOSPITALS AND RURAL REFERRAL CENTERS

13. IF THE HOSPITAL IS A SOLE COMMUNITY HOSPITAL OR WAS EVER A RURAL REFERRAL CENTER AND IS APPLYING UNDER THE SPECIAL ACCESS RULES, IS IT APPLYING TO THE CLOSEST MSA, NECMA, OR RURAL AREA?

YES ____ NO ____

14. INDICATE WHETHER THE AREA REQUESTED IS CLOSEST IN MILES, DRIVING TIME, OR BOTH AS COMPARED TO THE NEXT CLOSEST MSA, NECMA, OR RURAL AREA:

_____

A. BEGINNING AT THE HOSPITAL ENTRANCE, SHOW EACH ROAD AND RELATED MILES TO THE AREA THAT IS CLOSEST IN DISTANCE OVER IMPROVED ROADS. IF THE HOSPITAL NEEDS TO COMPLETE B. BELOW, ALSO COMPLETE THE TIME COLUMN, RELATING THE DRIVING TIME TO THE ENTRIES IN THE FIRST TWO COLUMNS. ATTACH A CLEARLY MARKED ORIGINAL MAP OR MAPS WITH LEGEND(S) UNDER ATTACHMENT E.

N/A

ROAD	MILEAGE	TIME
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
TOTAL	_____	_____

B. IF THE HOSPITAL REQUESTS REDESIGNATION BASED ON SHORTEST DRIVING TIME RATHER THAN DISTANCE (SEE ITEM A), IT MUST COMPLETE ALL THREE COLUMNS. ATTACH A CLEARLY MARKED ORIGINAL MAP OR MAPS WITH LEGEND(S) UNDER ATTACHMENT E.

	ROAD	MILEAGE	TIME
N/A			
	TOTAL		

V. RECLASSIFICATION REQUEST UNDER PROXIMITY RULES

15. IS THE HOSPITAL LOCATED WITHIN 35 MILES, IF A RURAL HOSPITAL, OR 15 MILES, IF URBAN, OF THE AREA TO WHICH IT SEEKS REDESIGNATION?

YES X NO ___

16. IF "YES" TO 15, SHOW THE NUMBER OF MILES OVER IMPROVED ROADS FROM THE HOSPITAL ENTRANCE TO THE BORDER OF THE REQUESTED AREA. ATTACH A CLEARLY MARKED ORIGINAL MAP OR MAPS WITH LEGEND(S) UNDER ATTACHMENT E.

	ROAD	DIR	MILEAGE
START	Jordan Hospital, MA	N	.5
	Sandwich St	E	.3
STOP	Obery St		
	Obery St	SW	.6
	South ST	S	.1
STOP	South ST		
	South St	S	.1
	Long Pond Rd	S	.1
STOP	Long Pond Rd		
	Long Pond Rd	S	8.0
	Local Road	W	.2
STOP	No Name		
	Local Road	E	.0
	Long Pond Rd	E	.1
	Rt3 (Pilgrims Hwy)	W	.2
STOP	Rt3 (Pilgrims Hwy)		
	Rt3 (Pilgrims Hwy)	SE	11

TOTAL 13.20

17. IF THE URBAN HOSPITAL IS LOCATED MORE THAN 15 MILES FROM THE REQUESTED AREA OR THE RURAL HOSPITAL IS LOCATED MORE THAN 35 MILES FROM THE REQUESTED AREA, INDICATE, IF APPLICABLE, WHETHER AT LEAST 50 PERCENT OF ITS EMPLOYEES RESIDE IN THE AREA TO WHICH THE HOSPITAL REQUESTS REDESIGNATION:

N/A YES ____ NO ____

IF "YES," ATTACH INFORMATION FROM THE HOSPITAL'S PAYROLL RECORDS THAT IDENTIFIES THE EMPLOYEES' HOME ADDRESSES BY ZIP CODE AND ATTACH A MAP THAT SHOWS THE RELATIONSHIP OF THE ZIP CODES TO THE COUNTIES AND/OR AREAS UNDER ATTACHMENT F. ALSO, INDICATE THE PERCENTAGE OF HOSPITAL EMPLOYEES WHO RESIDE IN THE REQUESTED AREA:

_____ %

VI. WAGE INDEX RECLASSIFICATION REQUEST

ATTACH THE HOSPITAL'S WAGE INDEX COMPUTATIONS FOR THE 108 PERCENT COMPARISON AND THE 84 PERCENT COMPARISON UNDER ATTACHMENT G. IF APPLYING USING THE DOMINATING HOSPITAL EXCEPTION CRITERIA, THE HOSPITAL MUST INCLUDE HOSPITAL-SPECIFIC AND CURRENT AREA INFLATED WAGES AND TOTAL HOURS AND MUST SHOW COMPUTATIONS FOR THE 40 PERCENT AND 108 PERCENT COMPARISON UNDER ATTACHMENT G.

VII. STANDARDIZED AMOUNT RECLASSIFICATION REQUEST

ATTACH THE HOSPITAL'S STANDARDIZED AMOUNT COMPARISON UNDER ATTACHMENT H.

18. A. INDICATE THE MEDICARE COST REPORTING PERIOD FOR THE MOST RECENTLY FILED COST REPORT:

COST REPORTING PERIOD BEGINNING DATE: ____ _____ _____

COST REPORTING PERIOD ENDING DATE: _____ _____ _____

ALL DATA ENTERED IN B. THROUGH J. MUST BE FOR THE COST REPORTING PERIOD INDICATED IN A. (INCLUDE THE COST REPORT AT ATTACHMENT L).

B. TOTAL MEDICARE COSTS (EXCLUDING PASSTHROUGHS):
(FROM WORKSHEET D-1, LINE 23)

_____

C. TOTAL MEDICARE DISCHARGES:
(FROM WORKSHEET S-3, PART I, LINE 12, COL. 13 LESS LINE 1, COL. 13)

_____

D. DRG AMOUNT - OTHER THAN OUTLIER PAYMENTS.
(FROM WORKSHEET S, PART A, LINE 1)

E. DRG AMOUNT - OUTLIER PAYMENTS:
(FROM WORKSHEET S, PART A, LINE 2)

F. IF THE HOSPITAL USES AN INTERMEDIARY-COMPUTED CASE MIX INDEX (CMI) INSTEAD OF A CMI FROM THE FEDERAL REGISTER, SHOW THE FISCAL INTERMEDIARY'S CMI. DO NOT COMPLETE IF USING A CMI FROM THE FEDERAL REGISTER:

IF A CMI IS ENTERED IN F., ATTACH A COPY OF THE FISCAL INTERMEDIARY LETTER UNDER ATTACHMENT I.

G. INDICATE THE HOSPITAL'S INDIRECT MEDICAL EDUCATION ADJUSTMENT FACTOR, IF APPLICABLE, EXPRESSED IN DECIMALS, NOT RATIOS.

G. _____

IF THE HOSPITAL ENTERS AN ADJUSTMENT FACTOR IN G., ATTACH A COPY OF THE FISCAL INTERMEDIARY LETTER UNDER ATTACHMENT J.

H. IF THE HOSPITAL USES MEDICAID AND SSI PERCENTAGES PROVIDED BY THE FISCAL INTERMEDIARY FOR ITS DISPROPORTIONATE SHARE ADJUSTMENT FACTOR, ENTER THESE PERCENTAGES EXPRESSED IN DECIMALS, NOT RATIOS. IF THE HOSPITAL IS NOT USING FISCAL INTERMEDIARY NUMBERS, COMPLETE H.1.a. and b.

a. MEDICAID 0. _____

b. SSI 0. _____

INCLUDE UNDER ATTACHMENT K A FISCAL INTERMEDIARY LETTER SUPPORTING THESE ENTRIES.

I. a. TOTAL INPATIENT DAYS: _____
(FROM WORKSHEET S-3, PART I, LINE 13, COL. 6)

b. TOTAL TITLE XIX (MEDICAID) INPATIENT DAYS: _____
(FROM WORKSHEET S-3, PART I, LINE 13, COL. 7)

J. INDICATE THE HOSPITAL'S BED SIZE: _____
(FROM WORKSHEET S-3, PART I, LINE 12, COL. 7 LESS LINE 11, COL. 7)

K. ATTACH THE HOSPITAL'S MOST RECENTLY FILED COST REPORT UNDER ATTACHMENT L. (NOTE: THE HOSPITAL DOES NOT SUBMIT A COST REPORT TO THE MGCRB UNLESS IT IS REQUESTING RECLASSIFICATION FOR THE STANDARDIZED AMOUNT. IT SHOULD ONLY SUBMIT THE COST REPORT WITH THE ORIGINAL APPLICATION; NO COST REPORT SHOULD BE ATTACHED TO THE MGCRB'S COPIES OF THE APPLICATION.)

VIII. ORAL HEARING REQUEST

19. INDICATE WHETHER THE HOSPITAL IS REQUESTING AN ORAL HEARING:

YES ____ NO X

ATTACH RATIONALE FOR REQUEST UNDER ATTACHMENT M.

IX. AFFIDAVIT

COUNTY OF Plymouth)

STATE OF Massachusetts)

I, Alan D. Knight (TYPE OR PRINT NAME OF HOSPITAL OFFICIAL) BEING DULY SWORN, DEPOSE AND SAY AS FOLLOWS:

(1) I CERTIFY THAT I HAVE EXAMINED THE ACCOMPANYING APPLICATION FOR GEOGRAPHIC RECLASSIFICATION FOR THE FEDERAL FISCAL YEAR OCTOBER 1, 1999 THROUGH SEPTEMBER 30, 2000 AND ALL OF THE SUPPORTING INFORMATION AND DATA INCLUDED IN THE SUBMITTAL BY. Jordan Hospital 22-0060 (HOSPITAL NAME AND MEDICARE PROVIDER NUMBER) TO THE MEDICARE GEOGRAPHIC CLASSIFICATION REVIEW BOARD. I HEREBY DECLARE UNDER PENALTY OF PERJURY (28 USC SECTION 1746) THAT THE FOREGOING IS TRUE AND CORRECT.

(2) I UNDERSTAND THAT AN OMISSION, MISSTATEMENT, MISREPRESENTATION, OR ERROR MADE IN A HOSPITAL'S APPLICATION AND SUPPORTING INFORMATION AND DATA FOR GEOGRAPHIC RECLASSIFICATION MAY BE GROUNDS FOR DENIAL OF THE HOSPITAL'S APPLICATION.

(3) I UNDERSTAND THAT AN OMISSION, MISSTATEMENT, MISREPRESENTATION, OR ERROR MADE IN A HOSPITAL'S APPLICATION AND SUPPORTING INFORMATION AND DATA FOR GEOGRAPHIC RECLASSIFICATION MAY BE CAUSE FOR LEGAL ACTION AGAINST THE APPLICANT HOSPITAL AND ITS OFFICIALS.

SIGNATURE OF HOSPITAL OFFICIAL: Alan D. Knight

TITLE: President/Chief Executive Officer

PHONE NUMBER: 508-830-2001

SUBSCRIBED AND SWORN BEFORE ME
THIS 17th (DAY) DAY OF August (MONTH) 1999

Denise L. Norris (SIGNATURE)

NOTARY PUBLIC
MY COMMISSION EXPIRES: May 12, 2006

:EOWP20

ATTACHMENT G CALCULATION USING TOTALS IN FEDERAL REGISTER OF 7/31/98

13-Aug-98

JORDAN HOSPITAL
GEOGRAPHIC RECLASSIFICATION APPLICATION
FEDERAL FISCAL YEAR 10/1/99TO 9/30/2000
PROVIDER # 220060
FEDERAL REGISTER 7/31/98

HOSPITAL AVERAGE HOURLY WAGE	$25.44
AVERAGE HOURLY WAGE FOR BOSTON-WORCESTER,LAWRENCE, LOWEL,BROCKTON,MA-NH	$23.4028
PERCENT	108%
CALCULATION	$25.2750

CONCLUSION: HOSPITALS AVERAGE HOURLY WAGE IS GREATER THAN 108% OF THE BOSTON-WORCESTER- LAWRENCE-LOWEL-BROCKTON,MA-NH AVERAGE HOURLY WAGE-HOSPITAL QUALIFIES

AVERAGE HOURLY WAGE FOR-BARNSTABLE-YARMOUTH,MASS	$31.9563
PERCENT	84%
CALCULATION	$26.8453

CONCLUSION: HOSPITALS AVERAGE HOURLY WAGE IS LESS THAN 84% OF THE BARNSTABLE-YARMOUTH, MASS AVERAGE HOURLY WAGE-HOSPITAL DOES NOT QUALIFY

BARNSTABLE-YARMOUTH ,MASS IS THE AREA TO WHICH THE HOSPITAL SEEKS RECLASSIFICATION.

:CWP20 ATTACHMENT G-1 ESTIMATED REVISED BARNSTABLE-YARMOUTH MA.
AVERAGE HOURLY WAGE CURRENTLY UNPUBLISHED IN FED REGISTER

3-Aug-99 JORDAN HOSPITAL
GEOGRAPHIC RECLASSIFICATION APPLICATION
FEDERAL FISCAL YEAR 10/1/99TO 9/30/2000
PROVIDER # 220060
FEDERAL REGISTER 7/31/98 USING ESTIMATED
REVISED BARNSTABLE/YARMOUTH AHW

HOSPITAL AVERAGE HOURLY WAGE	$25.44
AVERAGE HOURLY WAGE FOR BOSTON-WORCESTER,LAWRENCE, LOWEL,BROCKTON,MA-NH	$23.4028
PERCENT	108%
CALCULATION	$25.2750

CONCLUSION: HOSPITALS AVERAGE HOURLY WAGE IS GREATER THAN 108% OF THE BOSTON-WORCESTER- LAWRENCE-LOWEL-BROCKTON,MA-NH AVERAGE HOURLY WAGE-HOSPITAL QUALIFIES

AVERAGE HOURLY WAGE FOR-BARNSTABLE-YARMOUTH,MASS	$23.1500 *
PERCENT	84%
CALCULATION	$23.6460

CONCLUSION: HOSPITALS AVERAGE HOURLY WAGE IS MORE THAN 84% OF THE REVISED BARNSTABLE-YARMOUTH, MASS AVERAGE HOURLY WAGE.-HOSPITAL QUALIFIES

BARNSTABLE-YARMOUTH ,MASS IS THE AREA TO WHICH THE HOSPITAL SEEKS RECLASSIFICATION.

* estimated barnstable/yarmouth, ma. ahw including subsequent significant changes currently unpublished in the federal register

ATTACHMENT 1998

Directions

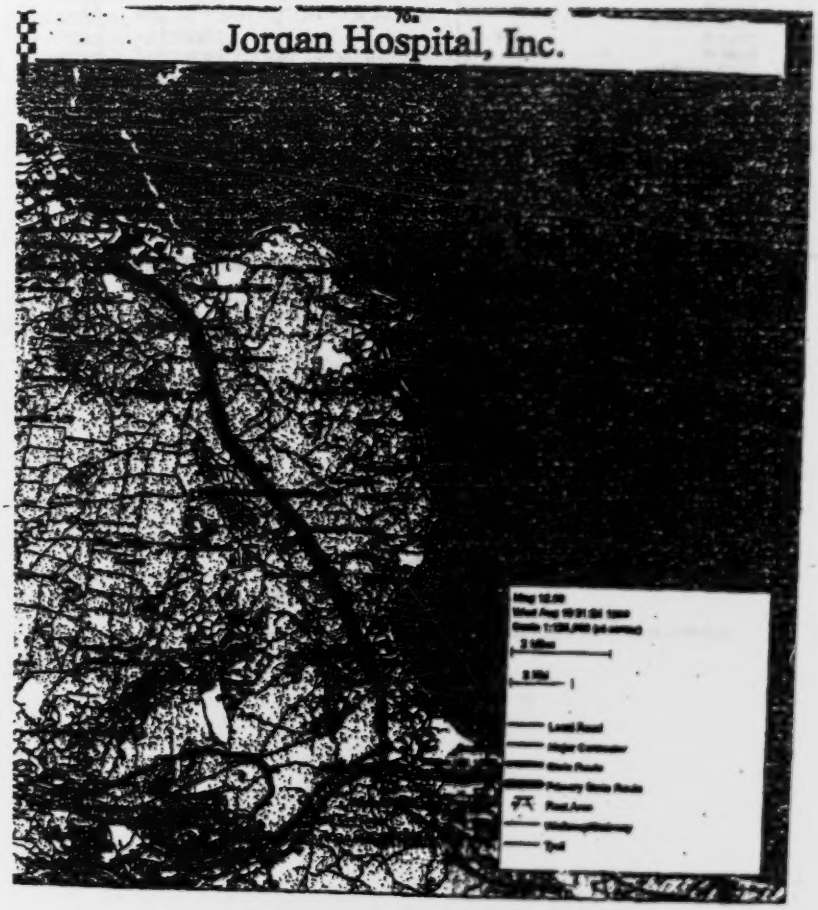
Street Atlas USA® 5.0

	Road	Dir	Near	Exit #	Time	Dist	Mi
	START - Jordan Hospital, MA						
1	Kendrick St	W					
2	Cleary St	S			0:00	0.6	0.5
	STOP - Cleary St				0:01	0.4	0.3
3	Cleary St						
4	Sandi St	SW					
		S			0:02	0.7	0.6
	STOP - South St				0:04	1.2	0.1
5	South St	S					
6	Long Pond Rd	E			0:03	1.3	0.1
	STOP - Long Pond Rd				0:05	1.4	0.1
7	Long Pond Rd						
8	Lowell Road	W			0:05	1.4	0.0
	STOP - Ma Name				0:08	1.4	0.2
9	Lowell Road						
10	Long Pond Rd	E					
11	RT.3 (Pilgrims Hwy)	N			0:06	1.4	0.0
	STOP - RT. 3(Pilgrims Hwy	W			0:06	1.5	0.1
12	RT.3 (Pilgrims Hwy)				0:06	1.5	0.2
	FINISH - RT.3	SE	Plymouth MA		0:06	1.3	11

Total Distance: 13 Mi, Total Time: 0:17

1997 DeLorme. All Rights Reserved.

Jordan Hospital, Inc.



MEDICARE GEOGRAPHIC CLASSIFICATION REVIEW BOARD
P. O. Box 31713
Baltimore, Maryland 21207-9713
Courier Service: 7500 Security Blvd., Room C1-09-13,
Baltimore MD 21244-1850
Phone: 410-786-0671
Fax: 410-786-6256
Email: dkinpiry@hcfa.gov

AUG 24 1999

98C0583

CERTIFIED MAIL

RECEIVED
AUG 26 1999

TO: Jordan Hospital
Michael Corcoran
275 Sandwich Street
Plymouth, MA 02360

RE: Jordan Hospital
Provider No. 22-0060
Federal Fiscal Year Beginning - 10/01/99

SUBJECT: Case Dismissal for Individual Hospital

The Medicare Geographic Classification Review Board hereby dismisses the hospital's request for geographic redesignation as not timely filed as required by Section 1886(d)(10) of the Social Security Act. Applications for Federal Fiscal Year 2000 were to be filed no later than September 1, 1998.

You may appeal this decision to the Administrator of the Health Care Financing Administration. The Office of the Attorney Advisor must receive your request for review no later than 15 days from the date of this notice. You should send your request to the following address:

Health Care Financing Administration
Office of the Attorney Advisor
Room C3-01-20
7500 Security Boulevard
Baltimore, MD 21244-1850

For the Board:

Hugh W. Long
Chairman

cc: Office of the Attorney Advisor, OCOS, HCFA
Division of Acute Care, Plan & Provider Purchasing Policy Group, CHPP, HCFA

*NOTE: Please reference case number in all communications.

EXHIBIT B

DONOGHUE, BARRETT & SINGAL, P.C.
ATTORNEYS AT LAW
ONE BEACON STREET, BOSTON, MASSACHUSETTS 02108-3113
TEL: (617) 720-5090 • FAX: (617) 720-5092

September 7, 1999

Via Federal Express

Office of Attorney Advisor
Health Care Financing Administration
Room C3-01-20
7500 Security Boulevard
Baltimore, MD 21244-1850

Re: Jordan Hospital, Inc., Provider No. 22-0060: Appeal of Medicare Geographical Classification Review Board Case Dismissal for Requested Designation for Federal Fiscal Year Beginning 10/1/99

Dear Administrator:

Pursuant to 42 CFR 412.276(b) and 42 CFR 412.278(b), please accept this as a timely request for review of the Medicare Geographical Classification Review Board's ("MGCRB") case dismissal of Jordan Hospital, Inc.'s ("Hospital") (Provider No. 22-0060) request for redesignation for Federal Fiscal Year 2000. See Exhibit 1. As the following demonstrates, the Hospital has been significantly harmed by extraordinary circumstances, all of which were beyond the Hospital's control. These extraordinary circumstances resulted from unique occurrences that were not clearly contemplated by the Health Care Financing Administration ("HCFA") when developing its procedures for geographic reclassification. Consequently, the Hospital requests that you reverse the MGCRB's decision and deem the application for redesignation as timely pursuant to 42 CFR 412.256(d), 412.276(b) and 412.278(b).

I. Facts

Enclosed as Exhibit 2 is a complete copy of the "Individual Hospital Application for Geographic Reclassification Effective Federal Fiscal Year 2000" ("Application"), which the Hospital filed with the MGCRB in August, 1999. In the Application, the Hospital seeks redesignation from the Boston, Massachusetts area (Identification No. 1123) to the Barnstable-Yarmouth, Massachusetts area (Identification No. 0743) for Federal Fiscal Year 2000. Although applications for redesignation relative to Fiscal Year 2000 were to be submitted by September 1, 1998, the Hospital was unfairly deprived of the opportunity to apply for redesignation at that time as a result of unique and peculiar circumstances, which are more fully set forth below.

Health Care Financing Administration
Appeal of Jordan Hospital, Inc.
Provider No. 22-0060
September 7, 1999
Page 2

In August 1998, the Hospital undertook the necessary analysis to determine whether it would be eligible to seek reclassification for Federal Fiscal Year 2000, which commences on October 1, 1999. Pursuant to 42 CFR 412.266, the Hospital used the average hourly wage included in the Wage Index published by HCFA in the July 31, 1998 Federal Register to conduct this review. Relying on the information contained in the Wage Index published in the July 31, 1998 Federal Register, the Hospital calculated whether it could meet the criteria set forth in 42 CFR 412.230(e)(1)(iv)(A) to obtain reclassification from the Boston, Massachusetts area (Identification No. 1123) to the Barnstable-Yarmouth, Massachusetts area (Identification No. 0743). Calculations based on the average hourly wage of the Barnstable-Yarmouth area published in the July 31, 1998 Federal Register indicated that the Hospital could not meet the 108%-84% criteria for redesignation. That is, for the relevant time period, the Hospital's average hourly wage was less than 84% of the Barnstable-Yarmouth average hourly wage published in the Federal Register.

Recently, however, the Hospital learned that one of two hospitals located in the Barnstable-Yarmouth area, namely Cape Cod Hospital, notified its Fiscal Intermediary in March 1999 that Cape Cod Hospital discovered several errors in its 1994, 1995, 1996, and 1997 cost reports. See Exhibit 3. The errors related to, among other things, wages and hours reported for certain years. For the 1995 cost report, necessary corrections included a decrease in wages reported and an increase in hours reported. Such corrections significantly impact the Fiscal Year 1999 wage index for the Barnstable-Yarmouth area, which is based in large part on costs reported in 1995 by Cape Cod Hospital. Despite these significant corrections, no changes to the Wage Index for the Barnstable-Yarmouth area have been published.

As in previous years, the Hospital would have submitted an application to the MGCRB for reclassification to the Barnstable-Yarmouth area for Fiscal Year 2000 but for the erroneous wage information published for the Barnstable-Yarmouth area in the July 31, 1998 Federal Register. More precisely, the Hospital has consistently submitted timely applications for redesignation in years past when the published average hourly wage for Barnstable-Yarmouth indicated the Hospital was eligible for redesignation. The foregoing is evidenced by the approvals of the MGCRB for the Hospital's reclassification to the Barnstable-Yarmouth area for Fiscal Years 1998 and 1999, which are attached hereto as Exhibits 4 and 5. Moreover, the Hospital timely filed an application for redesignation for Fiscal Year 2001 as evidenced by Exhibit 6. For the Fiscal Year 2000 application, however, the Hospital determined it was ineligible to apply for redesignation based on what is now known to be erroneous wage information published in the Federal Register.

More specifically, as in previous years, in 1998 the Hospital relied on information HCFA published in the Federal Register to ascertain whether it would meet the threshold necessary to apply for reclassification for Fiscal Year 2000. Unlike previous years, however, a confluence of

unusual and peculiar events resulted in erroneous average-hourly wage information being published in the Federal Register. That is, Cape Cod Hospital's erroneous cost reporting for Fiscal Year 1995 and the failure of HCFA and its agents to detect such errors resulted in the production and publication of a flawed wage-index for Fiscal Year 1999. Making the facts of this matter particularly unique is the fact that the Fiscal Year 1999 Wage Index reflected changes in cost reporting forms that were introduced in Fiscal Year 1995. These changes and the potential confusion associated with the changes created the basis for cost reporting errors by Cape Cod Hospital. This was further compounded by HCFA's implementation of a new process for developing the wage index, which likely contributed to HCFA's and its agents' failure to detect Cape Cod's cost reporting errors.

As in previous years, the Hospital relied in good faith on the average-hourly wage information HCFA published in the July 31, 1998 Federal Register to calculate whether the Hospital would be eligible to apply for redesignation for Fiscal Year 2000. Use of the incorrect information developed, verified, and published by HCFA in the Federal Register resulted in a determination that the Hospital could not meet the 108%-84% threshold to submit an application to the MGCRB for Fiscal Year 2000. Based on the corrected Cape Cod Hospital information, however, the Hospital recalculated its ability to meet the 108%-84% criteria by calculating the estimated impact of the Cape Cod Hospital 1995 cost reporting errors on the Barnstable-Yarmouth Wage Index. Such recalculation demonstrates that the Hospital meets the requisite threshold for reclassification for Fiscal Year 2000.

Based on the foregoing, on August 17, 1999, the Hospital submitted the Application to the MGCRB. Although the application deadline for reclassification for Fiscal Year 2000 was September 1, 1998, the unique and peculiar confluence of events resulting in the erroneous published wage information creates compelling equitable grounds for the reversal of the MGCRB's decision. Such action is necessary to prevent the inequities the Hospital would be made to suffer if the MGCRB's decision is not reversed. That is, the United States Supreme Court noted in American Farm Line v. Black Ball Freight Service, 397 U.S. 532m 539 (1970), "[i]t is always within the discretion of a court or administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it." To ensure that justice is served in this matter, the Hospital respectfully requests that you deem the Application timely filed based on the information set forth below.

II. Basis for Reversal of MGCRB's Decision.

Reversal of the MGCRB decision is necessary to remedy the harm the Hospital would otherwise suffer as a result of its justifiable, but detrimental reliance on the assumed accuracy of the Fiscal Year 1999 Wage Index. As the information set forth below will demonstrate, a

confluence of unique events not within the Hospital's control resulted in its ineligibility to apply for redesignation for Fiscal Year 2000 within the permit time period. Had such circumstances not arisen, the Hospital would have filed the reclassification application on or before September 1, 1998, as it had in past years; however, Cape Cod Hospital's actions and inactions, as well as HCFA's flawed implementation of its own procedures, adversely impacted the Hospital's ability to effect a beneficial reclassification for Fiscal Year 2000. As such, to ensure a just resolution for this unique and peculiar matter, the Hospital's Application of August 17, 1999 should be deemed timely filed.

A. Hospital's Justifiable Reliance on Published Fiscal Year 1999 Wage-Index For Barnstable-Yarmouth.

The Hospital justifiably relied upon the Fiscal Year 1999 Wage Index information published in the Federal Register on July 31, 1998 in determining whether it qualified for reclassification to the Barnstable-Yarmouth area. That is, for hospitals preparing reclassification applications, the MGCRB regulations specify that necessary wage information may be obtained from the Wage Index published by HCFA in the Federal Register. See 42 CFR 412.266. The regulation does not direct or identify any other source from which such information could be obtained and deemed reliable by the MGCRB when reviewing reclassification applications. Furthermore, no other reasonable source exists that contains this particular data.

Moreover, prior to the current version of 42 CFR 412.266, HCFA was the sole source of such data. Under such regulations, hospitals had to request from HCFA certain wage data necessary to complete reclassification applications and as a result have historically relied on HCFA for such data. Beginning in 1994, HCFA published average hourly wage data in the Federal Register. At that time, it revised 42 CFR 412.266 to direct hospitals to obtain necessary wage information to complete MGCRB applications from the Federal Register. Again, neither the regulation nor the rule published in the Federal Register on June 2, 1995 revising 42 CFR 412.266 alluded to any other source of reliable information from which hospitals applying for reclassification could obtain necessary wage information to complete their applications. Based on the foregoing, the Hospital's reliance on the published wage information for Barnstable-Yarmouth, and its assumption that it was accurate, was justifiable and should not be a basis for denying the Hospital an ability to obtain reclassification for which it qualifies.

B. Failure to Follow Established Policies in Developing the Fiscal Year 1999 Wage Index.

Three parties were responsible for ensuring the accuracy of the Fiscal Year 1999 Wage Index for Barnstable-Yarmouth: HCFA, its agents, and Cape Cod Hospital. Cape Cod Hospital was responsible for filing correct data and then verifying the accuracy of the wage data produced

from the information extracted from its 1995 cost report, while HCFA and its agents were ultimately responsible for the accuracy of the published wage information. The fiscal intermediaries ("FI") and HCFA are relied upon by hospitals to review the wage information extracted from cost reports, which is used to develop and publish an accurate wage index. The Hospital, which is classified in the Boston, Massachusetts area and must obtain reclassification to the Barnstable-Yarmouth area to use its wage-index, had no role in developing or verifying the accuracy of the Barnstable-Yarmouth wage-index.

Failures at critical points of the development and review process by Cape Cod Hospital, the FI, and HCFA resulted in the development and publication of an erroneous Fiscal Year 1999 Wage Index for the Barnstable-Yarmouth Area. The development and verification process and the failure of the FI and HCFA to detect errors in the 1995 cost report of Cape Cod Hospital, which ultimately resulted in the Hospital relying on incorrect wage information during its redesignation decision-making process, are outlined below.

The Fiscal Year 1999 wage index, which is used by hospitals to determine eligibility for reclassification for Fiscal Year 2000, was based on data collected from the Medicare cost reports submitted by hospitals for cost reporting periods ending in Fiscal Year 1995. See 63 Federal Register 40954, at 40966 (July 31, 1998). More precisely, the data for the Fiscal Year 1999 wage index was obtained from Worksheet S-3, Parts III and IV of the Fiscal Year 1995 Medicare cost reports. Id. It is important to note that the cost reporting forms for cost reports filed for Fiscal Year 1995 introduced changes to Worksheet S-3, which is where the Cape Cod Hospital reporting errors were made. The data file used by HCFA to construct the final wage index includes Fiscal Year 1995 data submitted to the Health Care Provider Cost Report Information System ("HCPIS"). Id.

The process established by HCFA for developing the Fiscal Year 1999 wage index and verifying the wage data so as to ensure accuracy included the following steps:

(1) FIs conducted desk reviews of hospital wage data and revised data was transmitted by the FI to HCFA;
(2) HCFA released edited wage data to the public;
(3) Hospitals, including Cape Cod Hospital, were required to verify the data or submit requests for wage data revisions with supporting documentation by a designated deadline;
(4) FIs were required to transmit appropriate revised wage data to HCPIS;
(5) HCFA published a proposed rule with comment period;
(6) Final wage data was made available to the public;
(7) Hospitals, such as Cape Cod Hospital, were required to notify HCFA and their FI, by a specified deadline, that wage data was incorrect due to

mishandling of data by the FI or HCFA;

(8) HCFA published the final rule in the Federal Register; and

(9) October 1, 1998, the final updated wage index for Fiscal Year 1999 took effect.

See 62 Federal Register 45966, 45992 (August 29, 1997); see also 63 Federal Register at 40971.

An important step in the foregoing process is the FI's review of the wage data contained in the cost report, as such information forms the basis of the wage index. At the outset, FIs must conduct a desk review of the wage data when settling cost reports. The desk review program for hospital wage data targets potentially aberrant data and checks the completeness and accuracy of the data, including verifying that reported costs are in conformance with HCFA's policy before they are used in calculating the wage index. 62 Federal Register at 45991. The FI checks the wage data and supporting documentation submitted by the hospital and contacts the hospital if additional information is needed to verify the accuracy of the data. Id. If adjustment to the data is necessary, the FI must notify the hospital in writing so the hospital may request adjustments. Id. In this case, the FI for Cape Cod Hospital did not detect the inaccuracies in the hospital's 1995 cost report, which were later identified by the hospital and reported to the FI in March 1999.

More importantly, it appears that HCFA's own policy to ensure that erroneous information is not used to develop the wage index either was not followed or broke-down in this particular case. Specifically, prior to publication of a final rule, HCFA is supposed to perform "an intensive review of the wage data, mostly through edits designed to identify aberrant data." See 63 Federal Register at 40971. Such a review includes HCFA conducting a "more focused review" than that of the FI to identify incomplete or inaccurate data. Id. at 45992. Moreover, HCFA has stated that to ensure the accuracy of the wage index it develops, it will review the

> "percent change in the updated wage index from the prior year wage index by . . . hospital location. In addition, [HCFA] reviews the wage data for any area that experiences a wage index change of 10 percent or more to determine the reason for the fluctuation. When necessary, [HCFA] contacts the appropriate fiscal intermediary to ensure the validity of the data or to obtain an explanation of the change." 60 Federal Register 45778 (September 1, 1995).

The difference in the average hourly wage for the Barnstable-Yarmouth area from Fiscal Year 1998 to Fiscal Year 1999 exceeded ten percent (10%). That is, the average hourly wage for Barnstable-Yarmouth in Fiscal Year 1998 was $28.72, as published in the August 29, 1997 Federal Register, whereas for Fiscal Year 1999, the average hourly wage was $31.96. This is an

increase of 11.28%. Had the prescribed review process occurred with respect to the significant change in the Barnstable-Yarmouth area wage, the errors now being reported by Cape Cod would have been detected and corrected in a timely manner so as to allow for an accurately published Fiscal Year 1999 wage index. Instead, an erroneous wage index for the Barnstable-Yarmouth area, with deviations in excess of HCFA's own standard, was published and justifiably relied upon by the Hospital in determining its eligibility to apply for reclassification.

C. Amended Cost Reporting Forms for 1995 and New Process for Development and Verification of Wage Index Resulted in Erroneous Wage Index for Fiscal Year 1999.

The 1999 Wage Index was the fist annual wage index subject to the new development and review process outlined in Section II(B) above. In addition, the cost reports from which the data to develop the wage index was extracted were subject to new cost reporting requirements. As set forth more fully before, these factors, the introduction of a new process for developing the wage index and the use of data extracted from a cost reports which included revised reporting requirement, created truly unique and extraordinary confluence events that appears to have contributed, if not resulted, in the publication of flawed wage information for the Barnstable-Yarmouth area.

As noted previously, the cost reporting forms for Fiscal Year 1995 introduced certain changes to the Worksheet S-3, which is the form from which relevant wage information is extracted to develop the Fiscal Year 1999 Wage Index. As early as 1997, interested parties expressed concern to HCFA regarding the impact of the changes to the 1995 cost reporting forms on the Fiscal Year 1999 Wage Index. 62 Federal Register at 45984. That is, such parties noted confusion and potential errors in the new Worksheet S-3 hospitals submitted. Adding fuel to such concern was the fact that a new, abbreviated review process would be implemented effective for the development of the Fiscal Year 1999 Wage Index.

Specifically, the wage index development and review process was modified in 1997 so as to require that wage data revisions be requested by hospitals and resolved before the publication of the proposed rule. In addition, the development and review process eliminated the "second review" conducted by FIs, which was conducted to ensure the inclusion and accuracy of all hospitals' wage data during the wage index development process. 62 Federal Register at 45991. These changes were implemented for the development and verification of the Fiscal Year 1999 wage index.

The implementation of the new wage index development and review process in the same year that the wage index would be based on data extracted from the 1995 revised Worksheet S-3 appears to have contributed to HCFA's publication of erroneous wage information. Underscoring

this assertion is the fact that the Fiscal Year 1999 Wage Index, which was published on July 31, 1998, was subsequently revised by HCFA after the final version was published. That is, HCFA published a final rule with comment in November 1998 allowing hospitals to request revisions to the wage index published in July 31, 1998 Federal Register. Then, in February 1999, HCFA published a final rule implementing the approved revisions requested pursuant to the November 1998 final rule with comment.

Significantly, HCFA noted that the subsequent revision of the Fiscal Year 1999 Wage Index stemmed from its awareness and acknowledgement that "certain aspect of the development of the FY 1999 wage index may have led to some confusion among the hospital community." 64 Federal Register 9378 (February 25, 1999). HCFA acknowledged that the following factors resulted in the need to revise the Fiscal Year 1999 wage index. These factors included: (i) the number of hospitals contacting it relative to the same types of problems; (ii) the changes to the Medicare cost report form for 1995, reflected for the first time in the Fiscal Year 1999 wage index; (iii) the revised statutory timetable for publishing the proposed and final rules, applied for the first time in Fiscal Year 1999; and (iv) the revised timetable for finalizing the wage data, applied for the first time in developing the Fiscal Year 1999 Wage Index. Id. Thus, the foregoing set of unique factors contributed to the development and publication of erroneous wage information, information upon which the Hospital relied.

It is important to note that process established to correct the erroneous wage information relied on hospitals, which are frequently competitors, to detect and request revisions to the wage index. As Cape Cod Hospital detected the errors in its 1995 Cost Report after the deadline established in the November 1998 final rule, the Barnstable-Yarmouth average hourly wage-index was not included in the corrected wage index. In light of the foregoing, the inequity to the Hospital under the specific circumstances of this situation is enhanced by the fact that the errors resulting in the flawed Barnstable-Yarmouth average hourly wage information occurred as a result of errors by another hospital and were beyond the Hospital's control.

Although HCFA stated that revisions to the wage index should not be construed as an acknowledgement that the development of the FY 1999 wage index, as reflected in the July 31, 1998 Federal Register, was in any way "unfair or unreasonable," the Hospital's current situation must be viewed in light of these facts. 64 Federal Register at 9379 (February 25, 1999). For example, the elimination of a "second review" by FIs appears to have contributed to the faulty wage index developed for Fiscal Year 1999. Specifically, for Fiscal Year 1998, when FIs were still conducting a second level of review, "of the 5,197 hospitals in the database, 2,652 hospitals had data elements that failed an initial edit" with respect to the FY 1998 wage index, resulting in the need for FIs to contact hospitals to revise or verify the data elements that resulted in the edit failures. See 62 Federal Register 29903, 29914. Such statistics of edit failure were consistent with those of previous years. That is, for Fiscal Year 1997, 2,814 hospitals had data

elements that failed an initial edit out of 5,222 hospitals in the database. See 61 FR 27444 (May 31, 1996). Likewise, for Fiscal Year 1996, 3,274 of 5,304 hospitals in the database had data elements that failed an edit. See 60 FR 2902 (June 2, 1995).

For the Fiscal Year 1999 Wage Index, however, when FIs no longer performed a second review, HCFA reported that "of the 5,123 hospitals originally in the data file, 851 hospitals have data elements that failed an edit." See 63 Federal Register 25576, 25586 (May 8, 1998). The foregoing suggests that the new wage index development and review process, which eliminated a second level of review by FIs, removed a needed safeguard for the development of the Fiscal Year 1999 wage index given that necessary information would be extracted from the new reporting form contained the 1995 cost reports. Such factors increased the likelihood if not contributed to result that flawed data would be undetected in the production of this particular wage index.

In this particular case, the Fiscal Year 1999 Wage Index development and review process did not detect Cape Cod Hospital's errors. The errors in the Cape Cod Hospital 1995 cost report with respect to wage information and the FI or HCFA failure to the failure to detect such erroneous information despite the 10% increase in the average-hourly wage for Barnstable-Yarmouth from 1998 to 1999 results in significant harm to the Hospital. Such factors, have uniquely convened in this exceptional circumstance to create an incorrect, Fiscal Year 1999 Wage Index for the Barnstable-Yarmouth area. While these are circumstances which, though highly unlikely reoccur, they should not be permitted to adversely impact the Hospital.

D. Unfair Impact of MGCRB Regulations on the Hospital.

The MGCRB's decision that the Application is untimely should be reversed because the strict application of the MGCRB filing requirements, with respect to this particular matter, results in a unfair, deleterious effect upon the Hospital. Specifically, by applying the MGCRB regulations to afford providers only one opportunity to file for redesignation, namely by the first day of the thirteenth month preceding fiscal year for which redesignation is sought ("Filing Period"). 42 CFR 412.256, results in procedural unfairness. Furthermore, by applying these provisions to prevent a subsequent filing in the event of compelling, unique, or other special circumstances, such as those set forth herein, violates the underlying intent of the regulatory framework and the Medicare program. Moreover, to fail to consider facts such as those presented by the Hospital results in unfair policy enforcement, which is not consistent with the principles of equity and justice.

MGCRB eligibility is inextricably linked to and dependant upon the accuracy of the average hourly wage information contained in the HCFA-published wage index. Hospitals are directed by 42 CFR 412.266 to obtain necessary wage information for preparation of

redesignation applications from the Wage Index published by HCFA annually in the Federal Register. The regulation does not direct or identify any other source from which such information may be obtained and deemed reliable by the MGCRB when reviewing reclassification applications. As such, the eligibility of hospitals for redesignation is dependant upon the average hourly wage published by HCFA in the Federal Register prior to the Filing Period, regardless of whether such information is accurate. If a hospital filed for redesignation with data in the Federal Register indicating it did not meet the threshold requirements, it surely would be denied. The inequity created by such regulatory scheme is evidenced by the plight of the Hospital, which through no fault of its own, was not "eligible" to request redesignation on September 1, 1998, but would be eligible based on Cape Cod's corrections to its 1995 cost report.

It is unfair to effectively require a hospital to rely upon HCFA's wage index in applying for redesignation and simultaneously preclude such hospital applying for redesignation based on flawed wage index information due to unique and peculiar circumstances beyond the affected hospital's control. More precisely, failure to afford such an affected hospital a mechanism for to reapply for redesignation after the Filing Period when, through no fault of the hospital, extraordinary circumstances adversely impact its ability to apply for reclassification is in and of itself inequitable. To reinforce the same by interpreting and applying the MGCRB filing requirements strictly in a case such as that of the Hospital would be unjust.

In light of the foregoing, it is clear that the exceptional and extraordinary events of this particular matter underscore the unfairness of the strict interpretation and application of the MGCRB filing requirements to the Hospital's unique situation. There were no other actions the Hospital could have taken to prevent the harm such strict application will cause. The sole remedy for the harm and inequity that the Hospital will suffer is to deem the Application timely filed.

III. Conclusion

As previously stated, the Hospital has historically applied for redesignation in a timely manner when the wage information published in the Federal Register indicated the Hospital was eligible for redesignation. This is evidenced by Exhibits 4 and 5, which demonstrated the MGCRB's approval for redesignation in Fiscal Year 1998 and Fiscal Year 1999. The Hospital has again made a timely filing to apply for redesignation for Fiscal Year 2001. See Exhibit 6. Fiscal Year 2000, however, stands alone, as an aberration resulting from an unusual confluence of events that are the product of the actions and inactions of Cape Cod Hospital, HCFA, and its agents, which deprived the Hospital of an opportunity to apply for reclassification for Fiscal Year 2000 to the Barnstable-Yarmouth area during the Filing Period.

The Hospital complied with all necessary requirements with respect to determining if it qualified for redesignation during the Filing Period. It relied on information it was directed to

Health Care Financing Administration
Appeal of Jordan Hospital, Inc.
Provider No. 22-0060
September 7, 1999
Page 11

use in assessing its ability to qualify for redesignation, namely wage information published by HCFA in the Federal Register. That information was erroneous. It was developed from erroneous information submitted by another hospital and undetected by HCFA or its agents despite an established process to detect the same. The Hospital had no way of knowing that such information was erroneous at the time it relied upon it, particularly as it accepted in good faith HCFA's declaration that "an intensive review of the wage data, mostly through edits designed to identify aberrant data" had been undertaken. See 63 Federal Register at 40971. As a result of the foregoing, the Hospital was ineligible to file for redesignation in Fiscal Year 2000 based on its justifiable but detrimental reliance on such erroneous information. The cost of such reliance is significant to the Hospital. It will be deprived $1.8 million dollars in prospective reimbursement, which equals approximately 8% of the Hospital's total Medicare reimbursement.

Again, the unique and peculiar facts of the Hospital's situation were completely beyond its control. As the United States Supreme Court noted in American Farm Line, "[i]t is always within the discretion of a court or administrative agency to relax or modify it procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it." Justice requires that the Hospital's Application be deemed timely, particularly where the unusual and unique circumstances that result in the significant and potential harm to the Hospital are highly unlikely to reoccur again.

If you have any questions regarding this matter, please feel free to contact Nina G. Edwards or me.

Sincerely,

Paul Barrett

Paul M. Barrett

PMB:kpf
cc: E. Schwartz
HCFA, Center for Health Plans & Providers

MEDICARE GEOGRAPHIC CLASSIFICATION REVIEW BOARD
P. O. Box 31713
Baltimore, Maryland 21207-9713
Courier Service: 7500 Security Blvd., Room C1-09-13,
Baltimore MD 21244-1850
Phone: 410-786-6671
FAX: 410-786-6256
E-MAIL: dbinquiry@hcfa.gov

Refer to:

AUG 24 1999

98C0583

CERTIFIED MAIL

RECEIVED
AUG 26 1999

TO: Jordan Hospital
Michael Corcoran
275 Sandwich Street
Plymouth, MA 02360

RE: Jordan Hospital
Provider No. 22-0060
Federal Fiscal Year Beginning - 10/01/99

SUBJECT: Case Dismissal for Individual Hospital

The Medicare Geographic Classification Review Board hereby dismisses the hospital's request for geographic redesignation as not timely filed as required by Section 1886(d)(10) of the Social Security Act. Applications for Federal Fiscal Year 2000 were to be filed no later than September 1, 1998.

You may appeal this decision to the Administrator of the Health Care Financing Administration. The Office of the Attorney Advisor must receive your request for review no later than 15 days from the date of this notice. You should send your request to the following address:

Health Care Financing Administration
Office of the Attorney Advisor
Room C3-01-20
7500 Security Boulevard
Baltimore, MD 21244-1850

For the Board:

Hugh W. Long
Chairman

cc: Office of the Attorney Advisor, OCOS, HCFA
Division of Acute Care, Plan & Provider Purchasing Policy Group, CHPP, HCFA

*NOTE: Please reference case number in all communications.

EXHIBIT 1

Jordan HOSPITAL

Jordan Hospital's mission is to provide health and wellness services with excellence.

275 Sandwich Street, Plymouth, MA 02360
(508) 746-2001 • TTY (508) 746-9161
Fax (508) 830-1131

August 17, 1999

Medicare Geographic Classification Review Board
P.O. Box 31713
Room C1-09-13
Baltimore, MD 21244-1850

Dear Sir:

Enclosed please find one original and two unbound copies with Documentation of Jordan Hospital's (220060) 1998 "Individual Hospital Application For Geographic Reclassification Effective Federal Fiscal Year 2000". Jordan Hospital is filing this Application at this time because our fiscal intermediary 'Associated Hospital Service of Maine' has received documentation correcting errors in the 1995 Average Hourly Wage Data that significantly lowers the 2000 Wage Index for the Barnstable-Yarmouth, Massachusetts Area 0743. Since these changes are not yet published in the Federal Register, we estimated the impact of these changes and include the results as Attachment G-1. We then recalculated the 108 % and 84 % thresholds showing that Jordan Hospital would qualify in FY 2000.

Should you have any questions or require additional information, please feel free to contact me at (508) 830-2013.

Sincerely,

Michael Corcoran
Director of Reimbursement and Budget

MC/br
Enclosure

cc: Health Care Financing Administration
Plan and Provider Purchasing Policy Group
Division of Acute Care
7500 Security Boulevard
Mail Stop C4-07-07
Baltimore, MD 21244-1850
RE: MGCRB Application

MEDICARE GEOGRAPHIC CLASSIFICATION REVIEW BOARD

1998 INDIVIDUAL HOSPITAL APPLICATION FOR

GEOGRAPHIC RECLASSIFICATION EFFECTIVE FEDERAL FISCAL YEAR 2000

PLEASE READ INSTRUCTIONS BEFORE COMPLETING THIS APPLICATION

THIS APPLICATION MUST BE COMPLETED AND RECEIVED BY THE MGCRB BY 5:00 P.M. EST, SEPTEMBER 1, 1998. FAILURE TO COMPLY WILL RESULT IN DISMISSAL.

PRINT IN INK OR TYPE WHEN COMPLETING THIS APPLICATION.

I. HOSPITAL INFORMATION

1. NAME OF HOSPITAL: Jordan Hospital

2. MEDICARE PROVIDER NUMBER: 22-0060

   MEDICARE NATIONAL PROVIDER IDENTIFIER (IF AVAILABLE):

3. STREET ADDRESS: 275 Sandwich Street

   Plymouth, Mass ZIP CODE 02360

4. NAME OF THE COUNTY IN WHICH THE HOSPITAL IS LOCATED:

   Plymouth

5. MAILING ADDRESS AND CONTACT NAME AND TELEPHONE NUMBER FOR ALL COMMUNICATIONS REGARDING THE APPLICATION:

   ORGANIZATION:
   PERSON: Michael Corcoran
   ADDRESS: 275 Sandwich Street
   Plymouth, Mass ZIP CODE 02360
   TELEPHONE NUMBER: 508-830-2013

IF THE INFORMATION ENTERED IS FOR A REPRESENTATIVE, PROVIDE AT ATTACHMENT A A LETTER FROM THE HOSPITAL DESIGNATING THE REPRESENTATIVE.

BEST AVAILABLE COPY

II. RECLASSIFICATION REQUEST

6. CIRCLE THE RECLASSIFICATION AND CRITERIA CATEGORY USED FOR THE APPLICATION:

   (A) WAGE INDEX VALUE - 108 AND 84 PERCENT (42 CFR 412.230(d)(3)(i)(A))

   B. WAGE INDEX VALUE - DOMINATING HOSPITAL EXCEPTION (42 CFR 412.230(d)(3))

   C. STANDARDIZED AMOUNT (42 CFR 412.230(d))

7. SEEKS RECLASSIFICATION FROM: Boston Massachusetts #1123
(SHOW THE NAME AND IDENTIFICATION NUMBER (SEE TAB 1) FOR THE STATE, MSA, OR NECMA.)

   SEEKS RECLASSIFICATION TO: Barnstable-Yarmouth Massachusetts #0743
(SHOW THE NAME AND IDENTIFICATION NUMBER (SEE TAB 1) FOR THE STATE, MSA OR NECMA.)

III. GENERAL INFORMATION

8. IS THE HOSPITAL ALSO A MEMBER OF A GROUP RECLASSIFICATION REQUEST?

   YES ___ NO X

9. IF "YES" TO 8., ENTER THE NAME OF THE COUNTY OR NECMA IN WHICH THE GROUP IS LOCATED:

   _____

10. INDICATE WHETHER THE HOSPITAL IS CURRENTLY CLASSIFIED AS A:

   A. SOLE COMMUNITY HOSPITAL YES ___ NO X

   IF "YES," ATTACH A CURRENT LETTER FROM THE FISCAL INTERMEDIARY OR HCFA REGIONAL OFFICE SUPPORTING THE HOSPITAL'S STATUS UNDER ATTACHMENT B.

   B. HAS THE HOSPITAL LOST ITS DESIGNATION AS A SOLE COMMUNITY HOSPITAL DUE TO AN MGCRB RECLASSIFICATION IN A PREVIOUS YEAR?

   YES ___ NO X

   IF "YES," IDENTIFY THE DATE STATUS WAS LOST: _____
   ATTACH THE FISCAL INTERMEDIARY OR HCFA REGIONAL OFFICE LETTER INDICATING WHEN STATUS WAS LOST UNDER ATTACHMENT C.

11. INDICATE WHETHER THE HOSPITAL HAS EVER BEEN CLASSIFIED AS A:

   RURAL REFERRAL CENTER YES ___ NO X

   IF "YES," ATTACH A LETTER FROM THE FISCAL INTERMEDIARY OR HCFA REGIONAL OFFICE SUPPORTING THE HOSPITAL'S STATUS UNDER ATTACHMENT D.

12. INDICATE PRIOR YEAR CASE NUMBER(S):

90C _____ 91C _____ 92C _____ 93C _____

94C _____ 95C _____ 96C _____ 97C _____

IV. RECLASSIFICATION REQUEST UNDER SPECIAL ACCESS RULES FOR SOLE COMMUNITY HOSPITALS AND RURAL REFERRAL CENTERS

13. IF THE HOSPITAL IS A SOLE COMMUNITY HOSPITAL OR WAS EVER A RURAL REFERRAL CENTER AND IS APPLYING UNDER THE SPECIAL ACCESS RULES, IS IT APPLYING TO THE CLOSEST MSA, NECMA, OR RURAL AREA?

YES ____ NO ____

14. INDICATE WHETHER THE AREA REQUESTED IS CLOSEST IN MILES, DRIVING TIME, OR BOTH AS COMPARED TO THE NEXT CLOSEST MSA, NECMA, OR RURAL AREA:

_____

A. BEGINNING AT THE HOSPITAL ENTRANCE, SHOW EACH ROAD AND RELATED MILES TO THE AREA THAT IS CLOSEST IN DISTANCE OVER IMPROVED ROADS. IF THE HOSPITAL NEEDS TO COMPLETE B. BELOW, ALSO COMPLETE THE TIME COLUMN, RELATING THE DRIVING TIME TO THE ENTRIES IN THE FIRST TWO COLUMNS. ATTACH A CLEARLY MARKED ORIGINAL MAP OR MAPS WITH LEGEND(S) UNDER ATTACHMENT E.

N/A

ROAD	MILEAGE	TIME
TOTAL		

B. IF THE HOSPITAL REQUESTS REDESIGNATION BASED ON SHORTEST DRIVING TIME RATHER THAN DISTANCE (see item A), IT MUST COMPLETE ALL THREE COLUMNS. ATTACH A CLEARLY MARKED ORIGINAL MAP OR MAPS WITH LEGEND(S) UNDER ATTACHMENT E.

	ROAD	MILEAGE	TIME
N/A			
	TOTAL		

V. RECLASSIFICATION REQUEST UNDER PROXIMITY RULES

15. IS THE HOSPITAL LOCATED WITHIN 35 MILES, IF A RURAL HOSPITAL, OR 15 MILES, IF URBAN, OF THE AREA TO WHICH IT SEEKS REDESIGNATION?

YES X NO ____

16. IF "YES" TO 15, SHOW THE NUMBER OF MILES OVER IMPROVED ROADS FROM THE HOSPITAL ENTRANCE TO THE BORDER OF THE REQUESTED AREA. ATTACH A CLEARLY MARKED ORIGINAL MAP OR MAPS WITH LEGEND(S) UNDER ATTACHMENT E.

	ROAD	DIR	MILEAGE
START	Jordan Hospital,MA	N	.5
	Sandwich St		
	Obery St	S	.3
STOP	Obery St	SW	.4
	Obery St	S	.1
STOP	South ST		
	South St	S	.1
	Long Pond Rd	S	.1
STOP	Long Pond Rd		
	Long Pond Rd	S	9.0
	Local Road	W	.2
STOP	No Name		
	Local Road	N	.0
	Long Pond Rd	N	.1
	RR3(Pilgrims Hwy)	W	.2
STOP	RR3(Pilgrims Hwy)		
	RR3(Pilgrims Hwy)	SE	.11 TOTAL 13.20

17. IF THE URBAN HOSPITAL IS LOCATED MORE THAN 15 MILES FROM THE REQUESTED AREA OR THE RURAL HOSPITAL IS LOCATED MORE THAN 35 MILES FROM THE REQUESTED AREA, INDICATE, IF APPLICABLE, WHETHER AT LEAST 50 PERCENT OF ITS EMPLOYEES RESIDE IN THE AREA TO WHICH THE HOSPITAL REQUESTS REDESIGNATION:

N/A YES ____ NO ____.

IF "YES," ATTACH INFORMATION FROM THE HOSPITAL'S PAYROLL RECORDS THAT IDENTIFIES THE EMPLOYEES' HOME ADDRESSES BY ZIP CODE AND ATTACH A MAP THAT SHOWS THE RELATIONSHIP OF THE ZIP CODES TO THE COUNTIES AND/OR AREAS UNDER ATTACHMENT F. ALSO, INDICATE THE PERCENTAGE OF HOSPITAL EMPLOYEES WHO RESIDE IN THE REQUESTED AREA:

_____ %

VI. WAGE INDEX RECLASSIFICATION REQUEST

ATTACH THE HOSPITAL'S WAGE INDEX COMPUTATIONS FOR THE 108 PERCENT COMPARISON AND THE 84 PERCENT COMPARISON UNDER ATTACHMENT G. IF APPLYING USING THE DOMINATING HOSPITAL EXCEPTION CRITERIA, THE HOSPITAL MUST INCLUDE HOSPITAL-SPECIFIC AND CURRENT AREA INFLATED WAGES AND TOTAL HOURS AND MUST SHOW COMPUTATIONS FOR THE 40 PERCENT AND 108 PERCENT COMPARISON UNDER ATTACHMENT G.

VII. STANDARDIZED AMOUNT RECLASSIFICATION REQUEST

ATTACH THE HOSPITAL'S STANDARDIZED AMOUNT COMPARISON UNDER ATTACHMENT H.

18. A. INDICATE THE MEDICARE COST REPORTING PERIOD FOR THE MOST RECENTLY FILED COST REPORT:

COST REPORTING PERIOD BEGINNING DATE: _____

COST REPORTING PERIOD ENDING DATE: _____

ALL DATA ENTERED IN B. THROUGH I. MUST BE FOR THE COST REPORTING PERIOD INDICATED IN A. (INCLUDE THE COST REPORT AT ATTACHMENT L).

B. TOTAL MEDICARE COSTS (EXCLUDING PASSTHROUGHS):
(FROM WORKSHEET D-1, LINE 23)

_____

C. TOTAL MEDICARE DISCHARGES:
(FROM WORKSHEET S-3, PART I, LINE 12, COL. 0 LESS LINE 1, COL. 12)

_____

D. DRG AMOUNT - OTHER THAN OUTLIER PAYMENTS:
(FROM WORKSHEET E, PART A, LINE 1)

_____

E. DRG AMOUNT - OUTLIER PAYMENTS:
(FROM WORKSHEET E, PART A, LINE 2)

_____

F. IF THE HOSPITAL USES AN INTERMEDIARY-COMPUTED CASE MIX INDEX (CMI) INSTEAD OF A CMI FROM THE FEDERAL REGISTER, SHOW THE FISCAL INTERMEDIARY'S CMI. DO NOT COMPLETE IF USING A CMI FROM THE FEDERAL REGISTER:

_____

IF A CMI IS ENTERED IN F., ATTACH A COPY OF THE FISCAL INTERMEDIARY LETTER UNDER ATTACHMENT I.

G. INDICATE THE HOSPITAL'S INDIRECT MEDICAL EDUCATION ADJUSTMENT FACTOR, IF APPLICABLE, EXPRESSED IN DECIMALS, NOT RATIOS:

0. _____

IF THE HOSPITAL ENTERS AN ADJUSTMENT FACTOR IN G., ATTACH A COPY OF THE FISCAL INTERMEDIARY LETTER UNDER ATTACHMENT J.

H. IF THE HOSPITAL USES MEDICAID AND SSI PERCENTAGES PROVIDED BY THE FISCAL INTERMEDIARY FOR ITS DISPROPORTIONATE SHARE ADJUSTMENT FACTOR, ENTER THESE PERCENTAGES EXPRESSED IN DECIMALS, NOT RATIOS. IF THE HOSPITAL IS NOT USING FISCAL INTERMEDIARY NUMBERS, COMPLETE H.1.a. and b.

a. MEDICAID 0. _____

b. SSI 0. _____

INCLUDE UNDER ATTACHMENT K A FISCAL INTERMEDIARY LETTER SUPPORTING THESE ENTRIES.

I. a. TOTAL INPATIENT DAYS: _____
(FROM WORKSHEET S-3, PART I, LINE 13, COL. 6)

b. TOTAL TITLE XIX (MEDICAID) INPATIENT DAYS: _____
(FROM WORKSHEET S-3, PART I, LINE 13, COL. 7)

J. INDICATE THE HOSPITAL'S BED SIZE: _____
(FROM WORKSHEET S-3, PART I, LINE 12, COL. 1 (SEE LINE 11, COL. 1))

K. ATTACH THE HOSPITAL'S MOST RECENTLY FILED COST REPORT UNDER ATTACHMENT L. (NOTE: THE HOSPITAL DOES NOT SUBMIT A COST REPORT TO THE MGCRB UNLESS IT IS REQUESTING RECLASSIFICATION FOR THE STANDARDIZED AMOUNT. IT SHOULD ONLY SUBMIT THE COST REPORT WITH THE ORIGINAL APPLICATION; NO COST REPORT SHOULD BE ATTACHED TO THE MGCRB'S COPIES OF THE APPLICATION.)

VIII. ORAL HEARING REQUEST

19. . . INDICATE WHETHER THE HOSPITAL IS REQUESTING AN ORAL HEARING:

YES ____ NO X

ATTACH RATIONALE FOR REQUEST UNDER ATTACHMENT M.

AFFIDAVIT

COUNTY OF Plymouth)

STATE OF Massachusetts)

I, Alan D. Knight (TYPE OR PRINT NAME OF HOSPITAL OFFICIAL) BEING DULY SWORN, DEPOSE AND SAY AS FOLLOWS:

(1) I CERTIFY THAT I HAVE EXAMINED THE ACCOMPANYING APPLICATION FOR GEOGRAPHIC RECLASSIFICATION FOR THE FEDERAL FISCAL YEAR OCTOBER 1, 1999 THROUGH SEPTEMBER 30, 2000 AND ALL OF THE SUPPORTING INFORMATION AND DATA INCLUDED IN THE SUBMITTAL BY Jordan Hospital 22-0060 (HOSPITAL NAME AND MEDICARE PROVIDER NUMBER) TO THE MEDICARE GEOGRAPHIC CLASSIFICATION REVIEW BOARD. I HEREBY DECLARE UNDER PENALTY OF PERJURY (18 USC SECTION 1746) THAT THE FOREGOING IS TRUE AND CORRECT.

(2) I UNDERSTAND THAT AN OMISSION, MISSTATEMENT, MISREPRESENTATION, OR ERROR MADE IN A HOSPITAL'S APPLICATION AND SUPPORTING INFORMATION AND DATA FOR GEOGRAPHIC RECLASSIFICATION MAY BE GROUNDS FOR DENIAL OF THE HOSPITAL'S APPLICATION.

(3) I UNDERSTAND THAT AN OMISSION, MISSTATEMENT, MISREPRESENTATION, OR ERROR MADE IN A HOSPITAL'S APPLICATION AND SUPPORTING INFORMATION AND DATA FOR GEOGRAPHIC RECLASSIFICATION MAY BE CAUSE FOR LEGAL ACTION AGAINST THE APPLICANT HOSPITAL AND ITS OFFICIALS.

SIGNATURE OF HOSPITAL OFFICER: Alan D. Knight

TITLE: President/Chief Executive Officer

PHONE NUMBER: 508-830-2001

SUBSCRIBED AND SWORN BEFORE ME
THIS 17th (DAY) DAY OF August (MONTH) 1999

Denise L. Norris (NOTARY PUBLIC)

NOTARY PUBLIC
MY COMMISSION EXPIRES: May 12, 2006

BEST AVAILABLE COPY

SOWP20

ATTAC.MENT G CALCULATION USING TOT. 3 IN
FEDERAL REGISTER OF 7/31/98

13-Aug-98

JORDAN HOSPITAL
GEOGRAPHIC RECLASSIFICATION APPLICATION
FEDERAL FISCAL YEAR 10/1/99TO 9/30/2000
PROVIDER # 220060
FEDERAL REGISTER 7/31/98

HOSPITAL AVERAGE HOURLY WAGE	$25.44
AVERAGE HOURLY WAGE FOR BOSTON-WORCESTER,LAWRENCE, LOWEL,BROCKTON,MA-NH	$23.4028
PERCENT	108%
CALCULATION	$25.2750

CONCLUSION: HOSPITALS AVERAGE HOURLY WAGE IS GREATER THAN 108% OF THE BOSTON-WORCESTER- LAWRENCE-LOWEL-BROCKTON,MA-NH AVERAGE HOURLY WAGE-HOSPITAL QUALIFIES

AVERAGE HOURLY WAGE FOR-BARNSTABLE-YARMOUTH,MASS	$31.9693
PERCENT	84%
CALCULATION	$26.8458

CONCLUSION: HOSPITALS AVERAGE HOURLY WAGE IS LESS THAN 84% OF THE BARNSTABLE-YARMOUTH, MASS AVERAGE HOURLY WAGE.-HOSPITAL DOES NOT QUALIFY

BARNSTABLE-YARMOUTH ,MASS IS THE AREA TO WHICH THE HOSPITAL SEEKS RECLASSIFICATION.

:OWP20 ATTACHMENT G-1 ESTIMATED REVISED BARNSTABLE-YARMOUTH MA.
AVERAGE HOURLY WAGE CURRENTLY UNPUBLISHED IN FED REGISTER

3-Aug-98 JORDAN HOSPITAL
GEOGRAPHIC RECLASSIFICATION APPLICATION
FEDERAL FISCAL YEAR 10/1/98TO 9/30/2000
PROVIDER # 220060
FEDERAL REGISTER 7/31/98 USING ESTIMATED
REVISED BARNSTABLE/YARMOUTH AHW

HOSPITAL AVERAGE HOURLY WAGE	$25.44
AVERAGE HOURLY WAGE FOR BOSTON-WORCESTER,LAWRENCE, LOWEL,BROCKTON,MA-NH	$23.4028
PERCENT	108%
CALCULATION	$25.2750

CONCLUSION: HOSPITALS AVERAGE HOURLY WAGE IS GREATER THAN 108% OF THE BOSTON-WORCESTER- LAWRENCE-LOWEL-BROCKTON,MA-NH AVERAGE HOURLY WAGE-HOSPITAL QUALIFIES

AVERAGE HOURLY WAGE FOR-BARNSTABLE-YARMOUTH,MASS	$28.1500 *
PERCENT	84%
CALCULATION	$23.6460

CONCLUSION: HOSPITALS AVERAGE HOURLY WAGE IS MORE THAN 84% OF THE REVISED BARNSTABLE-YARMOUTH, MASS AVERAGE HOURLY WAGE.-HOSPITAL QUALIFIES

BARNSTABLE-YARMOUTH ,MASS IS THE AREA TO WHICH THE HOSPITAL SEEKS RECLASSIFICATION.

* estimated barnstable/yarmouth, ma. ahw including subsequent significant changes currently unpublished in the federal register

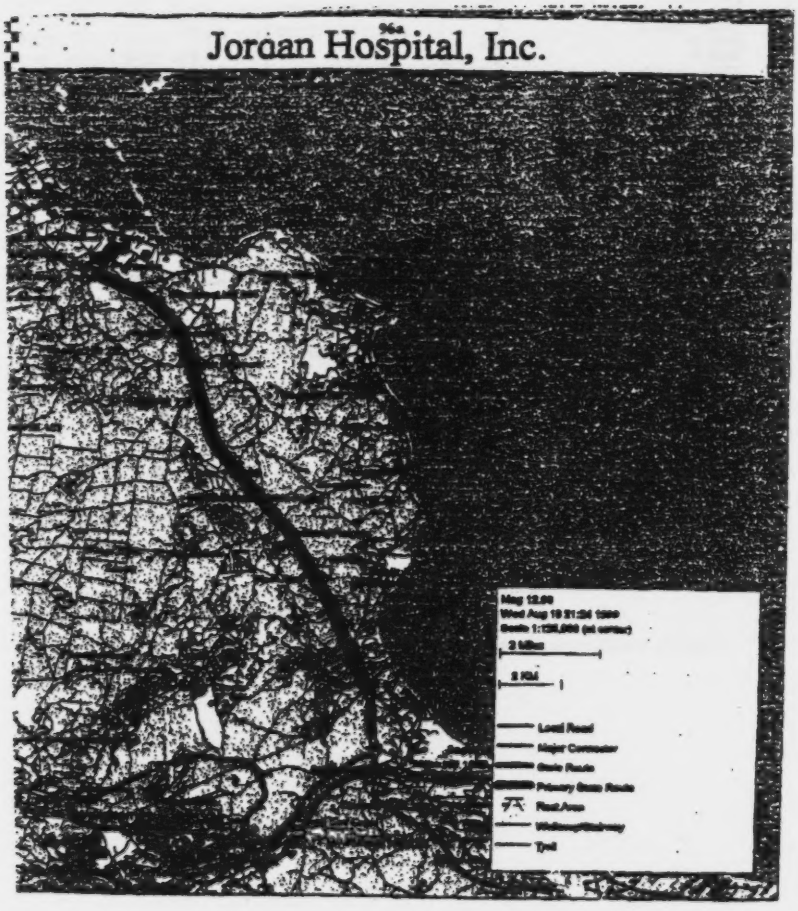
ATTACHMENT 1998

		Road	Dir	Near	Exit #	Time	Dist	Mi
		START - Jordan Hospital, MA						
	1	Sandwich St	N			0:00	0.0	0.5
	2	Obery St	S			0:01	0.4	0.3
		STOP - Obery St						
	3	Obery St	SW			0:02	0.7	0.6
	4	South St	S			0:04	1.2	0.1
		STOP - South St						
	5	South St	S			0:05	1.3	0.1
	6	Long Pond Rd	S			0:05	1.4	0.1
		STOP - Long Pond Rd						
	7	Long Pond Rd	S			0:05	1.4	0.0
	8	Lunt Road	W			0:05	1.4	0.2
		STOP - No Name						
	9	Lunt Road	S			0:06	1.6	0.0
	10	Long Pond Rd	N			0:06	1.6	0.1
	11	RR 3 (Pilgrims Hwy)	W			0:06	1.6	0.3
		STOP - RR 3(Pilgrims Hwy						
	12	RR 3 (Pilgrims Hwy)	SE	Plymouth MA		0:06	1.8	11
		FINISH - RR 3						

Total Distance: 13 Mi, Total Time: 0:17

97 DeLorme. All Rights Reserved.

Jordan Hospital, Inc.



CAPE COD HOSPITAL
An Affiliate of Cape Cod Healthcare

March 5, 1999

Mr. Robert Baroutas
Director
Associated Hospital Services of Maine
Audit & Reimbursement - Quincy
1515 Hancock Street Box 30
Quincy, MA 02171

Dear Mr. Baroutas:

I have attached an analysis of revisions that we feel should be made to Cape Cod Hospital's (CCH) FY 1996 Medicare cost report worksheet S-3 parts II and III. Based on our analysis, we feel that the following revisions need to be made to this cost report:

1. Line 1 Column 1: Salaries need to be increased by $2,798,468 to $59,517,825. This increase is to include physician salaries that were reported on worksheet A as "other" expenses in column 2. These physician salaries were originally reported on the cost report as physician fees, however they should have been reported as salary. (Please see attachment A for detail.)

2. Line 1 Column 2: Hours should be increased by 34,574 to 2,579,113. This increase is to include the physician hours corresponding to the salary adjustment above. (Please see attachment A for detail.)

3. Lines 4 & 5 Columns 1 & 4: Physician part A salary should be reported as $647,846, with 6,969 corresponding hours. Physician part B salaries should be reported as $2,150,622, with 27,605 corresponding hours. This adjustment is based on an appeal that we have filed with Medicare on their disallowance of all physician part A cost. Our allocation of physician expense is based on the as filed FY 96 cost report. (Please see attachment A for detail.)

4. Line 8.01 Column 4: Excluded area hours should be increased by 13,605 hours to 127,443. This adjustment is to reflect hours for the NPR re-class of marketing and family care salaries to non-patient. When this re-class was adjusted on the NPR, there was no corresponding hours re-classed to the excluded area. (Please see attachment B for detail.)

5. Line 11 Columns 1 & 4: Home Office wages and related costs were not included on the as-filed FY 1996 cost report nor incorporated by the fiscal intermediary on the NPR. Home Office wages and related costs for FY 1996 were $666,196 with 13,962 of related hours. (Please see attachment C for detail.)

P.O. Box 542
27 Park Street
[illegible] MA 02601
508.771.1511
www.capecodhealth.org

EXHIBIT 3

It is important that these revisions be made to the S-3 schedules so that these figures are reflected in the wage index calculation. Please review the attached letter and supporting schedules so that CCH's wage index data is reported correctly. If you have any questions, please call me at (508) 862-7670.

Sincerely,

Maura Kelly
Vice President Finance

cc: Joe Kirkpatrick, Massachusetts Hospital Association
Mark Rich, Foley & Driscoll, P.C.

Revision of HCFA Wage Index Data
Provider: Cape Cod Hospital
Provider No.: 22-0012

		FY 1996 Worksheet S-3, Pt II & III (HCFA)			FY 1996 (Revised) Worksheet S-3, Pt II & III With Revisions			
		Total Adjusted Salaries	Paid Hrs. Related to Salaries	Average Hourly Wage	Total Adjusted Salaries	Paid Hrs. Related to Salaries	Average Hourly Wage	
Salaries								
1	Total Salary	86,718,357	2,544,339	22.38	89,517,825	2,575,113	21.09	193
2	Non-Physician Anes. - Part A							
3	Non-Physician Anes. - Part B							
4	Physician Salaries - Part A				647,848	6,999	92.56	3
5	Physician Salaries - Part B	2,548,109	37,741	67.48	2,180,622	27,946	77.31	3
6	Interns & Residents (Approved)							
7	Home Office Personnel							
8	SNF							
8.01	Excluded Area Salaries	2,758,136	112,858	24.33	2,758,136	127,443	21.64	4
Other Wages & Related Costs								
9	Contract Labor	79,493	1,799	44.20	79,493	1,799	44.20	
10	Contract Labor: Phys Part A							
11	Home Office Salaries & Wage Related Costs				666,196	12,662	51.40	5
12	Home Office Phys. Part A							
Wage-Related Costs								
13	Wage-related costs (CORE)	14,931,229			15,039,100			
14	Wage-related costs (Other)							
15	Excluded Areas	1,440,029			1,440,029			
16	Non-Phys Anes. Part A				- -			
17	Non-Phys Anes. Part B							
18	Physician Part A							
19	Physician Part B	536,527			537,653			
20	Interns & Residents (Approved)							

		FY 1996 Worksheet S-3, Pt II & III (HCFA)			FY 1996 Worksheet S-3, Pt II & III With Revisions		
		Total Adjusted Salaries	Paid Hrs. Related to Salaries	Average Hourly Wage	Total Adjusted Salaries	Paid Hrs. Related to Salaries	Average Hourly Wage
Overhead Costs - Direct Salaries							
21	Employee benefits	690,929	29,067	23.75	690,929	29,067	23.75
22	Administrative and general	6,993,504	271,659	25.62	6,993,504	271,659	25.62
23	Maintenance and repairs	488,290	21,911	22.29	488,290	21,911	22.29
24	Operation of plant	1,846,877	82,383	19.99	1,846,877	82,383	19.99
25	Laundry and linen service	104,080	5,813	18.54	104,080	5,813	18.54
26	Housekeeping	1,360,229	98,735	13.78	1,360,229	98,735	13.78
27	Dietary	2,133,675	126,365	16.89	2,133,675	126,365	16.89
28	Cafeteria						
29	Maintenance of personnel						
30	Nursing administration	792,081	33,531	23.62	792,081	33,531	23.62
31	Central service and supply	1,381,598	73,401	18.99	1,381,598	73,401	18.99
32	Pharmacy	823,114	32,469	25.36	823,114	32,469	25.36
33	Medical records and medical library	1,488,662	83,348	17.48	1,488,662	83,348	17.48
34	Social service	1,204,503	47,889	25.17	1,204,503	47,889	25.17
35	Other general service						

Revision of HCFA Wage Index Data
Provider: Cape Cod Hospital
Provider No.: 22-0012

100a

	FY 1996 Worksheet S-3, Pt II & III (HCFA)			FY 1996 (Revised) Worksheet S-3, Pt II & III With Revisions		
	Total Adjusted Salaries	Paid Hrs. Related to Salaries	Average Hourly Wage	Total Adjusted Salaries	Paid Hrs. Related to Salaries	Average Hourly Wage
PART III - Hospital Wage Index Summary						
1 Net salaries	84,173,426	3,808,756	21.81	87,307,283	3,881,500	22.48
2 Excluded area salaries	2,758,138	113,838	24.23	2,758,138	(27,443	21.84
3 Subtotal salaries	81,415,113	3,782,980	21.48	84,808,098	3,434,085	22.53
4 Subtotal other wages and related costs	78,483	1,783	44.32	748,898	14,755	50.54
5 Subtotal wage-related costs	14,931,228		N/A	15,030,100		N/A
6 Total	96,425,804	3,384,759	27.74	79,384,827	2,438,839	28.89
7 Net salaries	84,173,248	2,896,798	21.81	87,307,253	2,881,508	22.48
8 Excluded area salaries	2,758,138	113,838	24.23	2,758,138	127,443	21.84
9 Subtotal salaries	81,415,113	2,782,980	21.48	84,808,098	2,434,085	22.53
10 Subtotal other wages and related costs	78,483	1,783	44.32	748,898	14,755	50.54
11 Subtotal wage-related costs	14,931,228		N/A	14,931,228		N/A
12 Total	96,496,804	2,384,763	27.74	79,384,888	2,438,839	28.82
13 Total overhead costs	18,454,911	902,446	20.36	18,454,911	902,446	20.36

Cape Cod Hospital
FY96 Wage Index Adjustments
Physician Part A & B Salaries

Line	Dept	EOC	Description	Hours	Salary	Part A %	Part A Hours	Part A Salary	Part B %	Part B Hours	Part B Salary
5	8916	380	Employee Health	111	5,525	100%	111	5,525	0%	0	0
6	8913	380	Medical Staff	1,872	211,053	100%	1,872	211,053	0%	0	0
25	8905	380	House Physician	480	28,104	100%	480	28,104	0%	0	0
42	8914	380	Radiation Therapy	8,328	807,754	35%	2,912	282,714	65%	5,408	525,040
60	8917	380	Obs	2,072	192,621	0%	0	0	100%	2,072	192,621
60	8918	380	Oncology	8,320	700,027	11%	924	77,781	89%	7,396	622,246
60	8925	380	PCI	10,695	690,487	5%	535	34,524	95%	10,160	655,963
60	8926	380	Const	2,784	162,897	5%	135	8,145	95%	2,569	154,752
				34,574	2,798,468		6,969	647,846		27,605	2,150,622

Part A/Part B Allocations are based on the FY 1996 as filed worksheet A-8-2 worksheet allocations. The salary figures reported on this worksheet were originally reported as "other" expenses on worksheet A column 2, however should be reported in column 1 as salaries.

101a

Attachment A

Cape Cod Hospital
FY96 Wage Index Adjustments
Excluded Area Salaries & Hours

A Line	Dept	Description	Hours	Salary	Percent Excluded	Excluded Hours	Excluded Salary
31	6600	Admin Psych.	68,108	1,430,346	100%	68,108	1,430,346
31	6650	Pedi Psych	43,593	962,199	100%	43,593	962,199
100.03	6965	Family Care	13,870	311,807	100%	13,870	311,807
6	8613	Community Affairs	4,870	76,296	44%	2,143	33,571
6	8705	PR / Marketing	11,200	45,865	44%	529	20,212
		Revised Excluded Area Hours and Salary				127,443	2,758,135
		Excluded Area Hours and Salary on NPR				113,838	2,758,135
						13,605	

Note: NPR reported a change in excluded area salaries, however no corresponding hours were allocated to the excluded area.

1024

Attachment B

CAPE COD HEALTHCARE
Working together for a healthier Cape Cod

Robert J. Coughlin
Director of Managed Care

March 23, 1999

Mr. Robert Baroutas
Director
Associated Hospital Services of Maine
1515 Hancock Street
PO Box 30
Quincy, MA 02171

Dear Mr. Baroutas:

By way of a letter dated March 4, 1999 (copy enclosed) we notified you that Cape Cod Hospital (CCH) had recently identified several changes that needed to be made to correct CCH's 1996 cost report worksheet S-3, parts II and III.

On further review of the trend analysis we completed as part of our overall review for the 1996 cost report, we have now determined that similar corrections are necessary for those same worksheets, for fiscal years 1994, 1995 and 1997. These changes are necessary to correct errors in the cost report CCH filed in each of those years.

The changes, by year, are described in detail below:

1997 Cost Report

- Line 1 Column 1: Salaries need to be increased by $2,767,700 to $60,687,639. This increase is to include physician salaries that were reported on worksheet A as "other" expenses in column 1.
- Line 1 Column 2: Hours should be increased by 39,725 to 2,491,483. This increase is to include the physician hours (33,886).
- Lines 4 & 5 Columns 1 & 4: Physician part A salary should be reported as $436,517, with 6,380 corresponding hours. Physician part B salaries should be reported as $2,311,183, with 27,506 corresponding hours. Our allocation of physician expense is based on the as filed FY97 cost report worksheet A-8-2.

Rte Lewis Bay Road, Hyannis, Massachusetts 02601 · Telephone (508) 862-5025 · Fax (508) 790-6930

- Line 8.01 Columns 1 & 4: Excluded area hours were not reported on the as-filed cost report. These hours should be reported as 115,700. In addition, we re-classed $20,530 of marketing expense to non-patient based on prior year audit adjustments

- Line 9 Column 1 & 4: This line should be left blank. This line is used to report contract labor costs for management services and direct patient care that is not already included in line 1.

- Line 11 Columns 1 & 4: Home Office wages and related costs were not included on the as-filed FY 1997 cost report. Home Office wages and related costs for FY 1997 were $1,301,280, with 23,452 of related hours.

- Lines 13 & 15 Columns 1: Wage related costs have been adjusted to exclude the fringe benefits related to the excluded areas. Line 13 should be $16,923,942 and line 15, $1448,679.

1995 Cost Report

- Line 1 Column 1: Salaries should be decreased by $4,300,233 to $58,911,207. This decrease in salaries is to exclude physician fees that were originally submitted as salaries on worksheet A.

- Line 1 Column 2: Hours should be increased by 417,851 to 2,656,656. The as-filed report used the "worked hours" rather than "paid hours".

- Lines 4 & 5 Columns 1 & 4: Physician part A salary should be reported as $515,836, with 5,545 corresponding hours. Physician part B salaries should be reported as $2,084,726, with 23,799 corresponding hours. Our allocation of physician expense is based on the audited FY95 cost report worksheet A-8-2.

- Line 8.01 Columns 1 & 4: Excluded area salaries have been adjusted to exclude psychiatric physician fees which were originally reported in worksheet A. Also, expense and hours for Project Care and Marketing have been re-classed to non-patient based on audit entries. The corrected amounts are as follows:

	Column 1	Column 2
Line 8.01	$2,794,397	140484

- Line 9 Column 1 & 4: This line should be left blank. This line is used to report contract labor costs for management services and direct patient care that is not already included in line 1.

- Line 11 Columns 1 & 4: Home Office wages and related costs were not included on the as-filed FY 1995 cost report. Home Office wages and related costs for FY 1995 were $655,643, with 9,153 of related hours.

- Lines 13 & 14 Columns 1: Wage related costs have been adjusted to exclude the fringe benefits related to the excluded areas.

1994 Cost Report

- Line 1, Column 1: Total salaries should be $55,564,908. The revised figure excludes physician fees.

- Line 1, Column 2: Total hours should be increased to 2,569,018 to reflect physician hours that were erroneously excluded.

- Lines 4& 5, Columns 1 & 2: Amounts were added to recognize physician salaries and hours for both Part A and Part B. The following table provides the corrected figures:

	Column 1	Column 2
Line 4	$529,578	6198
Line 5	$2,007,481	15228

- Line 8.01, Columns 1&2: Excluded area salaries (i.e. psychiatry, marketing, and community relations and project care) required adjustment. The table provides the corrected figures:

	Column1	Column 2
Line 8.01	$2,830,597	122744

- Line 9, Columns 1&2: The costs and hours previously assigned to this line have already been included in line 1. This line should be zero.

- Line 11, Columns 1& 2: Home office salaries and hours were added. The report was not required until after the 1994 report was filed. Revised salary costs and hours are as follows:

	Column 1	Column 2
Line11	$502,999	7317

> Line 13, Column 1: Wage related expenses (i.e. fringe benefits) were adjusted to reflect the addition of fringes for the excluded area and the physician Part B portion of salaries, as noted above. The corrected amount is $12,856,122.

Please feel free to contact me at the above number with any questions about these changes.

Sincerely,

Robert J. Coughlin
Director of Managed Care

FEB 1 2 1997

WAGE INDEX CASE SUMMARY

Case Number: 96C0442-1
Provider Name: . . . . . Jordan Hospital
Provider Number: 22-0060

Hospital's Average Hourly Wage = 24.7763

Seeking Redesignation From: 1123
LARGE URBAN BOSTON-WORCESTER-LAWRENCE-LOWELL-BROCKTON, MA-NH
MSA Average Hourly Wage = 22.7074

Seeking Redesignation To: 0743
OTHER URBAN BARNSTABLE-YARMOUTH, MA
MSA Average Hourly Wage = 26.6928

Timely Filed?: . . . . . YES

Sole Community Hospital?: . . . . . NO

Rural Referral Center?: . . . . . NO

SCH/RRC Status Lost Due to Prior MGCRB Reclassification?: . . NO

Applying Under Access Rules?: . . . . . N/A

If SCH/RRC, Is Requested Area Closest?: . . . . . N/A

Mileage to County Line?: 12.00

Meets Proximity Criteria [42 CFR 412.230(b)]?: . . . . . YES

Meets the 108% Criteria [42 CFR 412.230(e)(1)(iii)]?: . . . . YES
24.7763 / 22.7074 X 100 = 109.1111%

Meets the 84% Criteria [42 CFR 412.230(e)(1)(iv)(A)]?: . . . YES
24.7763 / 26.6928 X 100 = 92.8201%

Meets All Necessary Criteria For Reclassification?: . . . . . YES

EXHIBIT 4

108a
MEDICARE GEOGRAPHIC CLASSIFICATION REVIEW BOARD
P. O. Box 31713
Baltimore, Maryland 21207-8713
Courier Service: 7500 Security Blvd., Room C1-09-13,
Baltimore MD 21244-1850
Phone: 410-786-0671
FAX: 410-786-0296
Email: mbquigley@hcfa.gov

(13)

VPL

97C0233

JAN 30 1998

TO: Reimbursement Recovery, Inc.
Russell Jenkins
5123 Virginia Way
Suite A-12
Brentwood, TN 37027

RE: Jordan Hospital
Provider No. 22-0060
Federal Fiscal Year Beginning - 10/01/98

SUBJECT: Decision - Medicare Geographic Classification Review Board

The Medicare Geographic Classification Review Board has reviewed the hospital's application for redesignation in accordance with Section 1886(d)(10) of the Social Security Act and 42 CFR 412.230ff. The Board has considered the facts and the data submitted in support of its application. The Board hereby APPROVES the hospital's request for redesignation for the purpose of using the WAGE INDEX VALUE for fiscal year 10/01/98 through 09/30/99. See the attached Case Summary for additional information.

You may appeal this decision to the Administrator of the Health Care Financing Administration. The Office of the Attorney Advisor must receive your request for review no later than 15 days from the date of this notice. You should send your request to the following address:

Health Care Financing Administration
Office of the Attorney Advisor
Room N2-20-16
7500 Security Boulevard
Baltimore, MD 21244-1850

Board Members Participating:

Hugh W. Long
Cynthia Nixon
James Platt
Evonne L. Ulmer

For the Board:

Hugh W. Long
Chairman

Attachment

cc: Office of the Attorney Advisor, OCOS, OA, HCFA
Division of Acute Care, PPPP Group, CHPP, OA, HCFA

EXHIBIT 5

Wage Index Case Summary

Case Number: 97C0233-1
Provider Name: . . . . . Jordan Hospital
Provider Number: 22-0060

JAN 30 1998

Hospitals' Average Hourly Wage 25.3225

Seeking Redesignation From: 1123
LARGE URBAN BOSTON-WORCESTER-LAWRENCE-LOWELL-BROCKTON, MA-NH
MSA Average Hourly Wage= 23.1215

Seeking Redesignation To: 0743
OTHER URBAN BARNSTABLE-YARMOUTH, MA
MSA Average Hourly Wage= 28.7181

Timely Filed?: . . . . . Yes

Sole Community Hospital?: . . . . . No

Rural Referral Center?: . . . . . No

SCH Status Lost Due to Prior MGCRB Reclassification?: . . . . No

Applying Under Access Rules?: . . . . . N/A

If SCH/RRC, is Requested Area Closest?: . . . . . N/A

Mileage to County Line?: 12

Meets Proximity Criteria [42 CFR 412.230(b)]?: . . . . . Yes

Meets the 108% Criteria [42 CFR 412.230(e)(1)(iii)]?: . . . . Yes
25.3225 / 23.1215 x 100 = 109.5192

Meets the 84% Criteria [42 CFR 412.230(e)(1)(iv)(A)]?: . . . Yes
25.3225 / 28.7181 x 100 = 088.1760

Meets All Necessary Criteria For Reclassification?: . . . . . Yes

110a

DEPARTMENT OF HEALTH AND HUMAN SERVICES
MEDICARE GEOGRAPHIC CLASSIFICATION REVIEW BOARD
P. O. Box 31713
Baltimore, Maryland 21207-8713

Courier Service: 7500 Security Blvd., Room C1-09-13,
Baltimore MD 21244-1850

Phone: 410-786-3671
FAX: 410-786-0296
E-mail: rkirsh@hcfa.gov

Refer to:

99C0085*

AUG 2 5 1999

RECEIVED
AUG 30 1999

TO: Jordan Hospital
Michael Corcoran
Director of Reimbursement and Budget
275 Sandwich Street
Plymouth, MA 02360

RE: Jordan Hospital
Provider No. 22-0060
Federal Fiscal Year Beginning - 10/01/00

SUBJECT: Acknowledgment of Complete Application

The Medicare Geographic Classification Review Board (MGCRB) has received the above-captioned request for geographic redesignation which has been assigned case number 99C0085. The request has been timely filed and is technically complete. However, the MGCRB may request clarifying or more detailed information if needed. The Health Care Financing Administration (HCFA) has 30 days from the date of this notice in which to submit comments. If comments are submitted, a copy of the comments will be furnished to you.

If you wish to respond, you must do so within 15 days from the date of receipt of HCFA's comments. You should send your response to the MGCRB, with a copy to HCFA. At the close of the comment period, the case will be scheduled for an on-the-record decision unless you requested an oral hearing. If an oral hearing is granted, you will be notified of the date, time, and location of the hearing. Whether there is an on-the-record decision or an oral hearing, the MGCRB reclassification decision will be made no later than February 29, 2000.

Sincerely,

Steven R. Kirsh

Steven R. Kirsh, Director
Division of Jurisdiction and Case Management Staff

cc: Division of Acute Care, Plan and Provider Purchasing Policy Group, CHPP, HCFA

*NOTE: Please reference case number in all communications.

EXHIBIT 6

Department of Health and Human Services
Health Care Financing Administration
Office of the Attorney Advisor
Mail Stop: C3-01-20
7500 Security Blvd
Baltimore MD 21244
Office: 410-786-2179
Fax: 410-786-0043

SEP 30 1999

Paul M. Barrett, Esq.
Donoghue, Barrett & Singal, P.C.
One Beacon Street
Boston, Massachusetts 02108-3113

Re: Jordan Hospital, Inc., MGCRB Case No. 98C0583

Dear Mr. Barrett:

Enclosed is a copy of the Administrator's decision in the above case affirming the decision of the Medicare Geographic Classification Review Board. This constitutes the final administrative decision of the Secretary of Health and Human Services and is not subject to judicial review.

Sincerely yours,

Jacqueline R. Vaughn
Attorney Advisor

Enclosure

EXHIBIT D

HCFA
MEDICARE • MEDICAID
Health Care Financing Administration

DEPARTMENT OF HEALTH AND HUMAN SERVICES

HEALTH CARE FINANCING ADMINISTRATION

IN THE CASE OF:

Jordan Hospital, Inc. — MGCRB Case No. 98C0583

Provider No. 22-0060 — Date: August 24, 1999

****

This appeal is before the Administrator, Health Care Financing Administration (HCFA), for review of the dismissal of this case by the Medicare Geographic Classification Review Board (MGCRB). The review is pursuant to section 1886(d)(10) of the Social Security Act (the Act), as amended [42 USC 1395ww(d)], and is within the 20-day period specified in 42 CFR §412.256(d). The Hospital requested that the Administrator review the MGCRB's dismissal of its request for reclassification. Accordingly, this dismissal is now before the Administrator for final agency review.

ISSUE AND MGCRB DECISION

The issue involves whether the MGCRB properly dismissed the Hospital's request for reclassification. The Hospital, located in Boston, Massachusetts, requested reclassification to the Barnstable-Yarmouth, Massachusetts Metropolitan Statistical Area. By notice dated August 24, 1999, the MGCRB determined that the Hospital's request for reclassification was not timely filed as required by section 1886(d)(10) of the Act and dismissed the case.

HOSPITAL'S COMMENTS

The Hospital requested the Administrator's review of the MGCRB's dismissal of its case. The Hospital states that it has historically applied for redesignation in a timely manner when the wage information published in the Federal Register indicated the Hospital was eligible for redesignation. However, Fiscal Year 2000 stands alone, as an aberration resulting from an unusual confluence of events that are the product of the actions and inactions of Cape Cod

Hospital, HCFA, and its agents, which deprived the Hospital of an opportunity to apply for reclassification for Fiscal Year 2000 to the Barnstable-Yarmouth area during the filing period.

The Hospital asserts that it complied with all necessary requirements with respect to determining it qualified for redesignation during the filing period. It relied on information it was directed to use in the assessing its ability to qualify for redesignation, namely wage information published by HCFA in the Federal Register. That information was erroneous. It was developed from erroneous information submitted by another hospital and undetected by HCFA or its agents despite an established process to detect the same. The Hospital had no way of knowing that such information was erroneous.

DISCUSSION

The entire record furnished by the MGCRB has been examined, including all correspondence, position papers, exhibits, and subsequent submissions. All comments received timely are included in the record and have been considered.

Section 1886(d)(10)(C)(ii) of the Act establishes a deadline for submission of applications for reclassification and for MGCRB review. Section 1886(d)(10)(C)(ii) was amended by Section 4644(c) of the Balanced Budget Act of 1997 (Pub. Law 105-33) to require a hospital to submit an application for reclassification no later than the first day of the month preceding the beginning of the Federal fiscal year (FFY) (that is, by September 1) beginning with applications filed for reclassification for FFY 2000. The regulation at 42 CFR §412.256 further sets forth the requirements for the application process to accomplish the reclassification within the statutory deadline. Subsection (a)(1) requires that an application "be mailed or delivered to the MGCRB." The subsection (a)(2) language applicable to applications for reclassifications effective for FFY 2000 was amended, consistent with the Act, to require that a complete application must be received "not later than the first day of the month preceding the Federal fiscal year for which reclassification is requested." Further, subsection (a)(3) provides that "the filing date of an application is the date the application is *received by the MGCRB*." [Emphasis added.]

In this case, after review of the record and applicable law and regulations, the Administrator finds that the MGCRB properly dismissed the Hospital's request as untimely. The Hospital was seeking reclassification for FFY 2000; therefore, pursuant to the Act and Regulations discussed above, its application was required to have been received by the MGCRB by September 1, 1998.[1] The Hospital's application was not received until August 23, 1999. The

[1] See also 62 Fed. Reg. 45987.

Administrator finds that the Act and Regulations clearly state that the reclassification application must be received by the *MGCRB* by September 1, 1998. Because the Hospital's application in this case was not received by the MGCRB until August 23, 1999, the Administrator finds that the MGCRB properly dismissed the Hospital's request for failure to timely file an application for reclassification for FFY 2000.

DECISION

The Administrator affirms the MGCRB's dismissal of the Hospital's request for reclassification.

THIS CONSTITUTES THE FINAL ADMINISTRATIVE DECISION OF THE SECRETARY OF HEALTH AND HUMAN SERVICES

Date: 9/24/99

Kathleen M. King,
Executive Associate Administrator
Health Care Financing Administration

DONOGHUE, BARRETT & SINGAL, P.C.
ATTORNEYS AT LAW
ONE BEACON STREET, BOSTON, MASSACHUSETTS 02108-3113
TEL: (617) 720-5090 • FAX: (617) 720-5092

COPY

October 7, 1999

Via Federal Express

Office of Attorney Advisor
Health Care Financing Administration
Room C3-01-20
7500 Security Boulevard
Baltimore, MD 21244-1850

Re: MGCRB Case No. 98C0583: Jordan Hospital, Inc., Provider No. 22-0060, Request for Amendment to Administrator's Decision of the Medicare Geographical Classification Review Board's Case Dismissal for Federal Fiscal Year 2000

Dear Administrator:

Pursuant to 42 CFR 412.278(g), please accept this as a timely request for amendment of your decision to affirm the Medicare Geographical Classification Review Board's ("MGCRB") dismissal of Jordan Hospital, Inc.'s ("Hospital") (Provider No. 22-0060) request for redesignation for Federal Fiscal Year ("FFY") 2000. See Exhibit 1. As the following demonstrates, your decision signed September 28, 1999 and issued on September 30, 1999 ("Decision") must be amended as the evidence considered in reaching the Decision clearly demonstrates that an error was made with respect to the same, which must be corrected. Consequently, pursuant to 42 CFR 412.278(g), the Hospital respectfully requests that your Decision be amended and that you accept the Hospital's application as effectively filed.

I. Basis for Request to Amend the Decision

The Decision affirming the MGCRB's dismissal of the Hospital's request for redesignation states that the MGCRB's actions were proper because the FFY 2000 request for redesignation was received on August 23, 1999 rather than September 1, 1998. The Decision recites facts that reflect the confluence of events that rendered it impossible for the Hospital to file its request for redesignation on or before September 1, 1998; however, the discussion setting forth the basis to affirm the MGCRB's decision makes no reference to such facts. Rather, the Decision appears to have been based on a strict interpretation of the statutory and regulatory deadlines for filing an effective redesignation request. Consequently, it appears that the Decision to affirm the MGCRB's dismissal was erroneously made as the evidence presented by the Hospital, which clearly demonstrates that it was impossible and futile for the Hospital to comply with the applicable rules and regulations for filing an effective application, does not appear to have been

given any consideration. Furthermore, the fact that the Hospital's filing was rendered futile by HCFA itself also was not reflected in the Decision. The failure to reflect such evidence and holding the Hospital to making a filing that would have been futile if filed constitutes a patent error that must be corrected by amending the Decision to render the Hospital's application for FFY 2000 effectively filed and accepted.

II. Facts Evidencing Impossibility to Comply with the September 1, 1998 Deadline

A complete copy of the "Individual Hospital Application for Geographic Reclassification Effective Federal Fiscal Year 2000" ("Application"), which the Hospital filed with the MGCRB in August, 1999 is enclosed as Exhibit 2. In the Application, the Hospital sought redesignation from the Boston, Massachusetts area (Identification No. 1123) to the Barnstable-Yarmouth, Massachusetts area (Identification No. 0743) for FFY 2000. Although applications for redesignation relative to FFY 2000 were to be submitted by September 1, 1998, it was impossible and futile for the Hospital to apply for redesignation at that time as a result of unique and peculiar circumstances beyond the Hospital's control, which are more fully set forth below.

In August 1998, the Hospital undertook the necessary analysis to determine whether it would be eligible to seek reclassification for FFY 2000, which commences on October 1, 1999. Pursuant to 42 CFR 412.266, the Hospital used the average hourly wage included in the Wage Index published by HCFA in the July 31, 1998 Federal Register to conduct this review. Relying on the information contained in the Wage Index published in the July 31, 1998 Federal Register, the Hospital calculated whether it could meet the criteria set forth in 42 CFR 412.230(e)(1)(iv)(A) to obtain reclassification from the Boston, Massachusetts area (Identification No. 1123) to the Barnstable-Yarmouth, Massachusetts area (Identification No. 0743). Calculations based on the average hourly wage of the Barnstable-Yarmouth area published in the July 31, 1998 Federal Register indicated that the Hospital could not meet the 108%-84% criteria for redesignation. That is, for the relevant time period, the Hospital's average hourly wage was less than 84% of the Barnstable-Yarmouth average hourly wage published in the Federal Register. To file with these published statistics would have been a useless and noneffective action as such a filing clearly would have been denied.

Recently, however, the Hospital learned that one of two hospitals located in the Barnstable-Yarmouth area, namely Cape Cod Hospital, notified its Fiscal Intermediary ("FI") in March 1999 of several errors in its 1994, 1995, 1996, and 1997 cost reports. See Exhibit 3. The errors related to, among other things, wages and hours reported for certain years. For the 1995 cost report, necessary corrections included a decrease in wages reported and an increase in hours reported. Such corrections significantly impact the FFY 1999 wage index for the Barnstable-Yarmouth area, which is based in large part on costs reported in 1995 by Cape Cod Hospital. Despite these significant corrections, no changes to the Wage Index for the Barnstable-Yarmouth

area have been published.

As for FFY 1998, FFY 1999 and FFY 2001, the Hospital would have submitted on or before the designated deadline an application to the MGCRB for reclassification to the Barnstable-Yarmouth area for FFY 2000 but for the erroneous wage information published for the Barnstable-Yarmouth area in the July 31, 1998 Federal Register. The Hospital relied, justifiably, on information HCFA published in the Federal Register to ascertain whether it would meet the threshold necessary to apply for reclassification for FFY 2000. That is, no other resource was readily available nor sanctioned by the MGCRB regulations for use in determining eligibility for redesignation. Moreover, the Hospital justifiably assumed that the published wage index was accurate as HCFA attested that it performed "an intensive review of the wage data, mostly through edits designed to identify aberrant data." See 63 Federal Register 40954, at 40971 (July 31, 1998).

As more fully outlined in the Hospital's original appeal dated September 7, 1999, which is attached as Exhibit 1 and hereby incorporated by reference, a flawed wage-index for the Barnstable-Yarmouth area was developed as a result of: (i) the errors made by Cape Cod on its 1995 cost report, which was used to develop the Barnstable-Yarmouth wage index; (ii) the failure of the Cape Cod Hospital FI to detect the inaccuracies in the hospital's 1995 cost report; and (iii) the break-down of HCFA's own policy to ensure that erroneous information is not used to develop the wage index, particularly in a year when information was extracted from cost reporting forms that were new to providers. Furthermore, HCFA's established process for developing the wage index failed to detect that the difference in the average hourly wage for the Barnstable-Yarmouth area from FFY 1998 to FFY 1999 exceeded ten percent (10%), a trigger point that should result in an automatic review of the underlying data according to HCFA. See 60 Federal Register 45778 (September 1, 1995). The use of the incorrect information developed, verified, and published by HCFA in the Federal Register rendered it impossible for the Hospital to meet the 108%-84% threshold to submit an application to the MGCRB for FFY 2000 on or before September 1, 1998. These facts, however, do not appear to have been considered with respect to determining whether the MGCRB properly dismissed the Application.

As illustrated by the foregoing facts, which were set forth in the original appeal, the Hospital has consistently and effectively filed for redesignation in the years prior and since the relevant filing period of September 1, 1998. With respect to the September 1, 1998 filing deadline for redesignation in FFY 2000, the Hospital would have filed for redesignation on or before the filing deadline but for HCFA's publication of an erroneous wage index for the Barnstable-Yarmouth. That is, HCFA's prescribed review process for developing the FFY 1999 wage index failed to detect the inaccuracies in the Cape Cod Hospital cost reporting information for FFY 1995. As a result of the erroneous wage index information, the Hospital was effectively precluded from participating in the FFY 2000 redesignation application process as it did not meet

Health Care Financing Administration
Appeal of Jordan Hospital, Inc.
MGCRB Case No. 98C0583
October 7, 1999
Page 4

the necessary thresholds for redesignation based on calculations using the erroneous wage information. Upon learning of the errors in the Barnstable-Yarmouth wage index for FFY 1999, the Hospital immediately took action to prepare and file a request for redesignation for FFY 2000. The Decision did not, however, reflect these material facts.

The impossibility or futility of the application process made available to the Hospital and the fact that the Hospital qualifies for redesignation based upon the Application submitted to the MGCRB for FFY 2000 redesignation were not considered in the Decision. As such, the Decision is in error and improperly penalizes the Hospital for HCFA's, the FI's and another providers's errors when there was absolutely nothing different that the Hospital could have done to obtain redesignation. To base the Decision on the Hospital's failure to timely file cannot be fairly supported by the facts and is, therefore, clearly unfair and erroneous. Furthermore, HCFA's own actions rendered such a filing useless.

III. Basis for Amending the Administrator's Decision.

The Decision is in error because it cannot be supported by the facts presented. Specifically, the facts set forth in the original appeal and herein clearly demonstrate that it was impossible and futile for the Hospital to comply with the September 1, 1998 deadline. The Decision, however, does not adequately reflect, nor is it based upon, these facts. Rather, the Decision is based upon a strict interpretation of the MGCRB regulations. Such strict interpretation operates to unfairly and arbitrarily exclude the Hospital from participating in the MGCRB redesignation process for FFY 2000.

As evidenced by the foregoing, if the Decision is allowed to stand, it will render the MGCRB regulatory scheme a nullity as no means will have existed by which the Hospital could participate in the redesignation process on September 1, 1998, nor at this time, when it is patently obvious that the Hospital is eligible for redesignation. Moreover, the effect of the Decision will be to not only deprive the Hospital of its opportunity to participate in the MGCRB redesignation process, but to also impose a penalty on the Hospital for the errors of HCFA, the FI, and Cape Cod Hospital.

Once again, it is HCFA that publishes wage index information for geographic areas on an annual basis. HCFA also continuously amends the regulations pertaining to the hospital inpatient prospective payment system in order to have a cost effective and properly functioning provider reimbursement payment mechanism. See 63 Fed. Reg. at 41489 (July 30, 1999). The MGCRB process is necessarily linked to the publication of accurate wage index information so as to permit hospital-providers to apply for appropriate geographical designation and redesignation. See 42 CFR 412.63(w). In the instant situation, the process broke down because a relevant index figure for the Barnstable-Yarmouth area was erroneous due to no fault of the

Hospital. In such a situation, only the Administrator of HCFA, charged with the final responsibility for ensuring the integrity and accuracy of the prospective payment system, can decide to impute the correct wage index figure to an innocent provider/victim of inaccurate reporting and publishing, and permit, by unique but justifiable exception, the Hospital's Application to be deemed timely. In sum, if the MGCRB will consider only the date of filing to determine timeliness, then the Administrator must step in to execute a decision of allowance for the Hospital's Application so as to carry out the fundamental fairness that the regulatory prospective payment system is designed and intended to accomplish.

IV. Conclusion

The exceptional and extraordinary events of this particular matter clearly underscore the impossibility and futility associated with strict regulatory interpretation of the MGCRB regulations and the unfair result that would be exacted on the Hospital if strict interpretation and application of the MGCRB filing requirements are not reversed. Such impossibility was created solely by the actions, inactions, and errors of Cape Cod Hospital, HCFA, and the FIs. The Hospital played no part in bringing these circumstances to bear. Given such unique circumstances, the sole remedy for the harm and inequity that the Hospital will be made to suffer is to deem the Application effectively filed. As the United States Supreme Court noted in American Farm Line, "[i]t is always within the discretion of a court or administrative agency to relax or modify it procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it." American Farm Line v. Black Ball Freight Service, 397 U.S. 532, 539 (1970). Based on the foregoing, the Hospital respectfully requests that the Decision be amended to reflect that justice requires the MGCRB to deem the Hospital's Application for FFY 2000 as effectively filed due to the impossibility and futility of the Hospital to comply with the September 1, 1998 filing deadline.

If you have any questions regarding this matter, please feel free to contact Nina G. Edwards or me.

Sincerely,

Paul Barrett

Paul M. Barrett

Enclosures

cc: E. Schwartz
HCFA, Center for Health Plans & Providers

Department of Health and Human Services
Health Care Financing Administration
Office of the Attorney Advisor
Mail Stop: C3-01-20
7500 Security Blvd
Baltimore MD 21244
Office: 410 - 786 - 3179
Fax: 410 - 786 - 0042

SEP 30 1999

Paul M. Barrett, Esq.
Donoghue, Barrett & Singal, P.C.
One Beacon Street
Boston, Massachusetts 02108-3113

Re: Jordan Hospital, Inc., MGCRB Case No. 98C0583

Dear Mr. Barrett:

Enclosed is a copy of the Administrator's decision in the above case affirming the decision of the Medicare Geographic Classification Review Board. This constitutes the final administrative decision of the Secretary of Health and Human Services and is not subject to judicial review.

Sincerely yours,

Jacqueline R. Vaughn
Attorney Advisor

Enclosure

EXHIBIT 1

HCFA
MEDICARE - MEDICAID

DEPARTMENT OF HEALTH AND HUMAN SERVICES

HEALTH CARE FINANCING ADMINISTRATION

IN THE CASE OF:

Jordan Hospital, Inc. — MGCRB Case No. 98C0583

Provider No. 22-0060 — Date: August 24, 1999

****

This appeal is before the Administrator, Health Care Financing Administration (HCFA), for review of the dismissal of this case by the Medicare Geographic Classification Review Board (MGCRB). The review is pursuant to section 1886(d)(10) of the Social Security Act (the Act), as amended [42 USC 1395ww(d)], and is within the 20-day period specified in 42 CFR §412.256(d). The Hospital requested that the Administrator review the MGCRB's dismissal of its request for reclassification. Accordingly, this dismissal is now before the Administrator for final agency review.

ISSUE AND MGCRB DECISION

The issue involves whether the MGCRB properly dismissed the Hospital's request for reclassification. The Hospital, located in Boston, Massachusetts, requested reclassification to the Barnstable-Yarmouth, Massachusetts Metropolitan Statistical Area. By notice dated August 24, 1999, the MGCRB determined that the Hospital's request for reclassification was not timely filed as required by section 1886(d)(10) of the Act and dismissed the case.

HOSPITAL'S COMMENTS

The Hospital requested the Administrator's review of the MGCRB's dismissal of its case. The Hospital states that it has historically applied for redesignation in a timely manner when the wage information published in the Federal Register indicated the Hospital was eligible for redesignation. However, Fiscal Year 2000 stands alone, as an aberration resulting from an unusual confluence of events that are the product of the actions and inactions of Cape Cod

Hospital, HCFA, and its agents, which deprived the Hospital of an opportunity to apply for reclassification for Fiscal Year 2000 to the Barnstable-Yarmouth area during the filing period.

The Hospital asserts that it complied with all necessary requirements with respect to determining it qualified for redesignation during the filing period. It relied on information it was directed to use in the assessing its ability to qualify for redesignation, namely wage information published by HCFA in the Federal Register. That information was erroneous. It was developed from erroneous information submitted by another hospital and undetected by HCFA or its agents despite an established process to detect the same. The Hospital had no way of knowing that such information was erroneous.

DISCUSSION

The entire record furnished by the MGCRB has been examined, including all correspondence, position papers, exhibits, and subsequent submissions. All comments received timely are included in the record and have been considered.

Section 1886(d)(10)(C)(ii) of the Act establishes a deadline for submission of applications for reclassification and for MGCRB review. Section 1886(d)(10)(C)(ii) was amended by Section 4644(c) of the Balanced Budget Act of 1997 (Pub. Law 105-33) to require a hospital to submit an application for reclassification no later than the first day of the month preceding the beginning of the Federal fiscal year (FFY) (that is, by September 1) beginning with applications filed for reclassification for FFY 2000. The regulation at 42 CFR §412.256 further sets forth the requirements for the application process to accomplish the reclassification within the statutory deadline. Subsection (a)(1) requires that an application "be mailed or delivered to the MGCRB." The subsection (a)(2) language applicable to applications for reclassifications effective for FFY 2000 was amended, consistent with the Act, to require that a complete application must be received "not later than the first day of the month preceding the Federal fiscal year for which reclassification is requested." Further, subsection (a)(3) provides that "the filing date of an application is the date the application is *received by the MGCRB*." [Emphasis added.]

In this case, after review of the record and applicable law and regulations, the Administrator finds that the MGCRB properly dismissed the Hospital's request as untimely. The Hospital was seeking reclassification for FFY 2000; therefore, pursuant to the Act and Regulations discussed above, its application was required to have been received by the MGCRB by September 1, 1998.[1] The Hospital's application was not received until August 23, 1999. The

[1] See also 62 Fed. Reg. 45987.

Administrator finds that the Act and Regulations clearly state that the reclassification application must be received by the *MGCRB* by September 1, 1998. Because the Hospital's application in this case was not received by the MGCRB until August 23, 1999, the Administrator finds that the MGCRB properly dismissed the Hospital's request for failure to timely file an application for reclassification for FFY 2000.

DECISION

The Administrator affirms the MGCRB's dismissal of the Hospital's request for reclassification.

THIS CONSTITUTES THE FINAL ADMINISTRATIVE DECISION OF THE SECRETARY OF HEALTH AND HUMAN SERVICES

Date: 9/24/99

Kathleen M. King,
Executive Associate Administrator
Health Care Financing Administration

Jordan HOSPITAL

Jordan Hospital's mission is to provide health and wellness services with excellence.

275 Sandwich Street, Plymouth, MA 02360
(508) 746-2001 • TTY (508) 746-8161
Fax (508) 830-1131

August 17, 1999

Medicare Geographic Classification Review Board
P.O. Box 31713
Room C1-09-13
Baltimore, MD 21244-1850

Dear Sir:

Enclosed please find one original and two unbound copies with Documentation of Jordan Hospital's (220060) 1998 "Individual Hospital Application For Geographic Reclassification Effective Federal Fiscal Year 2000". Jordan Hospital is filing this Application at this time because our fiscal intermediary "Associated Hospital Service of Maine" has received documentation correcting errors in the 1995 Average Hourly Wage Data that significantly lowers the 2000 Wage Index for the Barnstable-Yarmouth, Massachusetts Area 0743. Since these changes are not yet published in the Federal Register, we estimated the impact of these changes and include the results as Attachment G-1. We then recalculated the 108% and 84% thresholds showing that Jordan Hospital would qualify in FY 2000.

Should you have any questions or require additional information, please feel free to contact me at (508) 830-2013.

Sincerely,

Michael Corcoran
Director of Reimbursement and Budget

MC/br
Enclosure

cc: Health Care Financing Administration
Plan and Provider Purchasing Policy Group
Division of Acute Care
7500 Security Boulevard
Mail Stop C4-07-07
Baltimore, MD 21244-1850
RE: MGCRB Application

EXHIBIT 2

MEDICARE GEOGRAPHIC CLASSIFICATION REVIEW BOARD

1998 INDIVIDUAL HOSPITAL APPLICATION FOR

GEOGRAPHIC RECLASSIFICATION EFFECTIVE FEDERAL FISCAL YEAR 2000

PLEASE READ INSTRUCTIONS BEFORE COMPLETING THIS APPLICATION

THIS APPLICATION MUST BE COMPLETED AND RECEIVED BY THE MGCRB BY 5:00 P.M. EST, SEPTEMBER 1, 1998. FAILURE TO COMPLY WILL RESULT IN DISMISSAL.

PRINT IN INK OR TYPE WHEN COMPLETING THIS APPLICATION.

I. HOSPITAL INFORMATION

1. NAME OF HOSPITAL: Jordan Hospital

2. MEDICARE PROVIDER NUMBER: 22-0060

   MEDICARE NATIONAL PROVIDER IDENTIFIER (IF AVAILABLE):

3. STREET ADDRESS: 275 Sandwich Street

   Plymouth, Mass ZIP CODE 02360

4. NAME OF THE COUNTY IN WHICH THE HOSPITAL IS LOCATED:

   Plymouth

5. MAILING ADDRESS AND CONTACT NAME AND TELEPHONE NUMBER FOR ALL COMMUNICATIONS REGARDING THE APPLICATION:

   (ORGANIZATION)
   (PERSON) Michael Corcoran
   (ADDRESS) 275 Sandwich Street

   Plymouth, Mass (ZIP CODE) 02360

   (TELEPHONE NUMBER) 508-830-2013

IF THE INFORMATION ENTERED IS FOR A REPRESENTATIVE, PROVIDE AT ATTACHMENT A A LETTER FROM THE HOSPITAL DESIGNATING THE REPRESENTATIVE.

II. RECLASSIFICATION REQUEST

6. CIRCLE THE RECLASSIFICATION AND CRITERIA CATEGORY USED FOR THE APPLICATION:

   (A) WAGE INDEX VALUE - 108 AND 84 PERCENT (42 CFR 412.230(d)(3)(i)(A))

   B. WAGE INDEX VALUE - DOMINATING HOSPITAL EXCEPTION (42 CFR 412.230(d)(3))

   C. STANDARDIZED AMOUNT (42 CFR 412.230(d))

7. SEEKS RECLASSIFICATION FROM: Boston Massachusetts #1123
   (SHOW THE NAME AND IDENTIFICATION NUMBER (SEE TAB 1) FOR THE STATE, MSA, OR NECMA.)

   SEEKS RECLASSIFICATION TO: Barnstable-Yarmouth Massachusetts #0743
   (SHOW THE NAME AND IDENTIFICATION NUMBER (SEE TAB 1) FOR THE STATE, MSA OR NECMA.)

III. GENERAL INFORMATION

8. IS THE HOSPITAL ALSO A MEMBER OF A GROUP RECLASSIFICATION REQUEST?

   YES ___ NO X

9. IF "YES" TO 8., ENTER THE NAME OF THE COUNTY OR NECMA IN WHICH THE GROUP IS LOCATED:

   _____

10. INDICATE WHETHER THE HOSPITAL IS CURRENTLY CLASSIFIED AS A:

   A. SOLE COMMUNITY HOSPITAL YES ___ NO X

   IF "YES," ATTACH A CURRENT LETTER FROM THE FISCAL INTERMEDIARY OR HCFA REGIONAL OFFICE SUPPORTING THE HOSPITAL'S STATUS UNDER ATTACHMENT B.

   B. HAS THE HOSPITAL LOST ITS DESIGNATION AS A SOLE COMMUNITY HOSPITAL DUE TO AN MGCRB RECLASSIFICATION IN A PREVIOUS YEAR?

   YES ___ NO X

   IF "YES," IDENTIFY THE DATE STATUS WAS LOST: _____
   ATTACH THE FISCAL INTERMEDIARY OR HCFA REGIONAL OFFICE LETTER INDICATING WHEN STATUS WAS LOST UNDER ATTACHMENT C.

11. INDICATE WHETHER THE HOSPITAL HAS EVER BEEN CLASSIFIED AS A:

   RURAL REFERRAL CENTER YES ___ NO X

   IF "YES," ATTACH A LETTER FROM THE FISCAL INTERMEDIARY OR HCFA REGIONAL OFFICE SUPPORTING THE HOSPITAL'S STATUS UNDER ATTACHMENT D.

12. INDICATE PRIOR YEAR CASE NUMBER(S):

90C _____ 91C _____ 92C _____ 93C _____

94C _____ 95C _____ 96C _____ 97C _____

IV. RECLASSIFICATION REQUEST UNDER SPECIAL ACCESS RULES FOR SOLE COMMUNITY HOSPITALS AND RURAL REFERRAL CENTERS

13. IF THE HOSPITAL IS A SOLE COMMUNITY HOSPITAL OR WAS EVER A RURAL REFERRAL CENTER AND IS APPLYING UNDER THE SPECIAL ACCESS RULES, IS IT APPLYING TO THE CLOSEST MSA, NECMA, OR RURAL AREA?

YES ____ NO ____

14. INDICATE WHETHER THE AREA REQUESTED IS CLOSEST IN MILES, DRIVING TIME, OR BOTH AS COMPARED TO THE NEXT CLOSEST MSA, NECMA, OR RURAL AREA:

_____

A. BEGINNING AT THE HOSPITAL ENTRANCE, SHOW EACH ROAD AND RELATED MILES TO THE AREA THAT IS CLOSEST IN DISTANCE OVER IMPROVED ROADS. IF THE HOSPITAL NEEDS TO COMPLETE B. BELOW, ALSO COMPLETE THE TIME COLUMN, RELATING THE DRIVING TIME TO THE ENTRIES IN THE FIRST TWO COLUMNS. ATTACH A CLEARLY MARKED ORIGINAL MAP OR MAPS WITH LEGEND(S) UNDER ATTACHMENT E.

N/A

ROAD	MILEAGE	TIME
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
TOTAL	_____	_____

B. IF THE HOSPITAL REQUESTS REDESIGNATION BASED ON SHORTEST DRIVING TIME RATHER THAN DISTANCE (SEE ITEM A), IT MUST COMPLETE ALL THREE COLUMNS. ATTACH A CLEARLY MARKED ORIGINAL MAP OR MAPS WITH LEGEND(S) UNDER ATTACHMENT E.

	ROAD	MILEAGE	TIME
N/A			
	TOTAL		

V. RECLASSIFICATION REQUEST UNDER PROXIMITY RULES

15. IS THE HOSPITAL LOCATED WITHIN 35 MILES, IF A RURAL HOSPITAL, OR 15 MILES, IF URBAN, OF THE AREA TO WHICH IT SEEKS REDESIGNATION?

YES X NO ____

16. IF "YES" TO 15, SHOW THE NUMBER OF MILES OVER IMPROVED ROADS FROM THE HOSPITAL ENTRANCE TO THE BORDER OF THE REQUESTED AREA. ATTACH A CLEARLY MARKED ORIGINAL MAP OR MAPS WITH LEGEND(S) UNDER ATTACHMENT E.

	ROAD	DIR	MILEAGE
START	Jordan Hospital,MA	N	.5
	Sandwich St		
STOP	Obery St	S	.3
	Obery St	SW	.6
STOP	South ST	S	.1
	South St	S	.1
STOP	Long Pond Rd	S	.1
	Long Pond Rd	S	9.0
STOP	Local Road	W	.2
	No Name		
	Local Road	E	.0
	Long Pond Rd	N	.1
STOP	SR3(Pilgrims Hwy)	W	.2
	SR3(Pilgrims Hwy)	SE	11

TOTAL 13.20

17. IF THE URBAN HOSPITAL IS LOCATED MORE THAN 15 MILES FROM THE REQUESTED AREA OR THE RURAL HOSPITAL IS LOCATED MORE THAN 35 MILES FROM THE REQUESTED AREA, INDICATE, IF APPLICABLE, WHETHER AT LEAST 50 PERCENT OF ITS EMPLOYEES RESIDE IN THE AREA TO WHICH THE HOSPITAL REQUESTS REDESIGNATION:

N/A YES ____ NO ____

IF "YES," ATTACH INFORMATION FROM THE HOSPITAL'S PAYROLL RECORDS THAT IDENTIFIES THE EMPLOYEES' HOME ADDRESSES BY ZIP CODE AND ATTACH A MAP THAT SHOWS THE RELATIONSHIP OF THE ZIP CODES TO THE COUNTIES AND/OR AREAS UNDER ATTACHMENT F. ALSO, INDICATE THE PERCENTAGE OF HOSPITAL EMPLOYEES WHO RESIDE IN THE REQUESTED AREA:

_____ %

VI. WAGE INDEX RECLASSIFICATION REQUEST

ATTACH THE HOSPITAL'S WAGE INDEX COMPUTATIONS FOR THE 108 PERCENT COMPARISON AND THE 84 PERCENT COMPARISON UNDER ATTACHMENT G. IF APPLYING USING THE DOMINATING HOSPITAL EXCEPTION CRITERIA, THE HOSPITAL MUST INCLUDE HOSPITAL-SPECIFIC AND CURRENT AREA INFLATED WAGES AND TOTAL HOURS AND MUST SHOW COMPUTATIONS FOR THE 40 PERCENT AND 108 PERCENT COMPARISON UNDER ATTACHMENT G.

VII. STANDARDIZED AMOUNT RECLASSIFICATION REQUEST

ATTACH THE HOSPITAL'S STANDARDIZED AMOUNT COMPARISON UNDER ATTACHMENT H.

18. A. INDICATE THE MEDICARE COST REPORTING PERIOD FOR THE MOST RECENTLY FILED COST REPORT:

COST REPORTING PERIOD BEGINNING DATE: ____ _____ ____ _____

COST REPORTING PERIOD ENDING DATE: _____ ____ _____

ALL DATA ENTERED IN B. THROUGH J. MUST BE FOR THE COST REPORTING PERIOD INDICATED IN A. (INCLUDE THE COST REPORT AT ATTACHMENT L).

B. TOTAL MEDICARE COSTS (EXCLUDING PASSTHROUGHS):
(FROM WORKSHEET D-1, LINE 23)

_____ ____ _____

C. TOTAL MEDICARE DISCHARGES:
(FROM WORKSHEET S-3, PART I, LINE 12, COL. 15 LESS LINE 1, COL. 15)

_____ ____ _____

D. DRG AMOUNT - OTHER THAN OUTLIER PAYMENTS:
(FROM WORKSHEET E, PART A, LINE 1)

E. DRG AMOUNT - OUTLIER PAYMENTS:
(FROM WORKSHEET E, PART A, LINE 2)

F. IF THE HOSPITAL USES AN INTERMEDIARY-COMPUTED CASE MIX INDEX (CMI) INSTEAD OF A CMI FROM THE FEDERAL REGISTER, SHOW THE FISCAL INTERMEDIARY'S CMI. DO NOT COMPLETE IF USING A CMI FROM THE FEDERAL REGISTER:

IF A CMI IS ENTERED IN F., ATTACH A COPY OF THE FISCAL INTERMEDIARY LETTER UNDER ATTACHMENT I.

G. INDICATE THE HOSPITAL'S INDIRECT MEDICAL EDUCATION ADJUSTMENT FACTOR, IF APPLICABLE, EXPRESSED IN DECIMALS, NOT RATIOS:

G.

IF THE HOSPITAL ENTERS AN ADJUSTMENT FACTOR IN G., ATTACH A COPY OF THE FISCAL INTERMEDIARY LETTER UNDER ATTACHMENT J.

H. IF THE HOSPITAL USES MEDICAID AND SSI PERCENTAGES PROVIDED BY THE FISCAL INTERMEDIARY FOR ITS DISPROPORTIONATE SHARE ADJUSTMENT FACTOR, ENTER THESE PERCENTAGES EXPRESSED IN DECIMALS, NOT RATIOS. IF THE HOSPITAL IS NOT USING FISCAL INTERMEDIARY NUMBERS, COMPLETE H.1.a. and b.

a. MEDICAID H.

b. SSI H.

INCLUDE UNDER ATTACHMENT K A FISCAL INTERMEDIARY LETTER SUPPORTING THESE ENTRIES.

I. a. TOTAL INPATIENT DAYS:
(FROM WORKSHEET S-3, PART I, LINE 13, COL. 8)

b. TOTAL TITLE XIX (MEDICAID) INPATIENT DAYS:
(FROM WORKSHEET S-3, PART I, LINE 13, COL. 7)

J. INDICATE THE HOSPITAL'S BED SIZE:
(FROM WORKSHEET S-3, PART I, LINE 12, COL. 7 (SEE LINE 13, COL. 7))

K. ATTACH THE HOSPITAL'S MOST RECENTLY FILED COST REPORT UNDER ATTACHMENT L. (NOTE: THE HOSPITAL DOES NOT SUBMIT A COST REPORT TO THE MGCRB UNLESS IT IS REQUESTING RECLASSIFICATION FOR THE STANDARDIZED AMOUNT. IT SHOULD ONLY SUBMIT THE COST REPORT WITH THE ORIGINAL APPLICATION; NO COST REPORT SHOULD BE ATTACHED TO THE MGCRB'S COPIES OF THE APPLICATION.)

VIII. ORAL HEARING REQUEST

19. INDICATE WHETHER THE HOSPITAL IS REQUESTING AN ORAL HEARING:

YES ____ NO X

ATTACH RATIONALE FOR REQUEST UNDER ATTACHMENT M.

IX. AFFIDAVIT

COUNTY OF Plymouth)

STATE OF Massachusetts)

I, Alan D. Knight (TYPE OR PRINT NAME OF HOSPITAL OFFICIAL) BEING DULY SWORN, DEPOSE AND SAY AS FOLLOWS:

(1) I CERTIFY THAT I HAVE EXAMINED THE ACCOMPANYING APPLICATION FOR GEOGRAPHIC RECLASSIFICATION FOR THE FEDERAL FISCAL YEAR OCTOBER 1, 1999 THROUGH SEPTEMBER 30, 2000 AND ALL OF THE SUPPORTING INFORMATION AND DATA INCLUDED IN THE SUBMITTAL BY Jordan Hospital 22-0060 (HOSPITAL NAME AND MEDICARE PROVIDER NUMBER) TO THE MEDICARE GEOGRAPHIC CLASSIFICATION REVIEW BOARD. I HEREBY DECLARE UNDER PENALTY OF PERJURY (18 USC SECTION 1746) THAT THE FOREGOING IS TRUE AND CORRECT.

(2) I UNDERSTAND THAT AN OMISSION, MISSTATEMENT, MISREPRESENTATION, OR ERROR MADE IN A HOSPITAL'S APPLICATION AND SUPPORTING INFORMATION AND DATA FOR GEOGRAPHIC RECLASSIFICATION MAY BE GROUNDS FOR DENIAL OF THE HOSPITAL'S APPLICATION.

(3) I UNDERSTAND THAT AN OMISSION, MISSTATEMENT, MISREPRESENTATION, OR ERROR MADE IN A HOSPITAL'S APPLICATION AND SUPPORTING INFORMATION AND DATA FOR GEOGRAPHIC RECLASSIFICATION MAY BE CAUSE FOR LEGAL ACTION AGAINST THE APPLICANT HOSPITAL AND ITS OFFICIALS.

SIGNATURE OF HOSPITAL OFFICER: Alan D. Knight

TITLE: President/Chief Executive Officer

PHONE NUMBER: 508-830-2001

SUBSCRIBED AND SWORN BEFORE ME
THIS 17th (DAY) DAY OF August (MONTH) 1999

Denise L. Norris
(NOTARY PUBLIC)

NOTARY PUBLIC
MY COMMISSION EXPIRES: May 12, 2006

:SOWP20

ATTACHMENT G CALCULATION USING TOTALS IN FEDERAL REGISTER OF 7/31/98

13-Aug-99

JORDAN HOSPITAL
GEOGRAPHIC RECLASSIFICATION APPLICATION
FEDERAL FISCAL YEAR 10/1/99TO 9/30/2000
PROVIDER # 220060
FEDERAL REGISTER 7/31/98

HOSPITAL AVERAGE HOURLY WAGE	$25.44
AVERAGE HOURLY WAGE FOR BOSTON-WORCESTER,LAWRENCE, LOWEL,BROCKTON,MA-NH	$23.4078
PERCENT	108%
CALCULATION =	$25.2750

CONCLUSION: HOSPITALS AVERAGE HOURLY WAGE IS GREATER THAN 108% OF THE BOSTON-WORCESTER- LAWRENCE-LOWEL-BROCKTON,MA-NH AVERAGE HOURLY WAGE-HOSPITAL QUALIFIES

AVERAGE HOURLY WAGE FOR-BARNSTABLE-YARMOUTH,MASS	$31.6863
PERCENT	84%
CALCULATION	$26.6456

CONCLUSION: HOSPITALS AVERAGE HOURLY WAGE IS LESS THAN 84% OF THE BARNSTABLE-YARMOUTH, MASS AVERAGE HOURLY WAGE.-HOSPITAL DOES NOT QUALIFY

BARNSTABLE-YARMOUTH ,MASS IS THE AREA TO WHICH THE HOSPITAL SEEKS RECLASSIFICATION.

EOWP2C ATTACHMENT G-1 ESTIMATED REVISED BARNSTABLE-YARMOUTH MA.
AVERAGE HOURLY WAGE CURRENTLY UNPUBLISHED IN FED REGISTER

13-Aug-99 JORD[illegible] HOSPITAL
GEOGR[illegible]HIC RECLASSIFICATION APPLICATION
FEDERA[illegible]CAL YEAR 10/1/99TO 9/30/2000
PROVIDER # 220060
FEDERAL REGISTER 7/31/98 USING ESTIMATED
REVISED BARNSTABLE/YARMOUTH AHW

HOSPITAL AVERAGE HOURLY WAGE	$25.44
AVERAGE HOURLY WAGE FOR BOSTON-WORCESTER,LAWRENCE LOWEL,BROCKTON,MA-NH	$23.4028
PERCENT	108%
CALCULATION	$25.2750

CONCLUSION: HOSPITALS AVERAGE HOURLY WAGE IS GREATER THAN 108% OF THE BOSTON-WORCESTER- LAWRENCE-LOWEL-BROCKTON,MA-NH AVERAGE HOURLY WAGE-HOSPITAL QUALIFIES

AVERAGE HOURLY WAGE FOR-BARNSTABLE-YARMOUTH,MASS	$28.1500 *
PERCENT	84%
CALCULATION	$23.6460

CONCLUSION: HOSPITALS AVERAGE HOURLY WAGE IS MORE THAN 84% OF THE REVISED BARNSTABLE-YARMOUTH, MASS AVERAGE HOURLY WAGE-HOSPITAL QUALIFIES

BARNSTABLE-YARMOUTH ,MASS IS THE AREA TO WHICH THE HOSPITAL SEEKS RECLASSIFICATION.

* estimated barnstable/yarmouth, ma. ahw including subsequent significant changes currently unpublished in the federal register

ATTACHMENT 1998

Directions

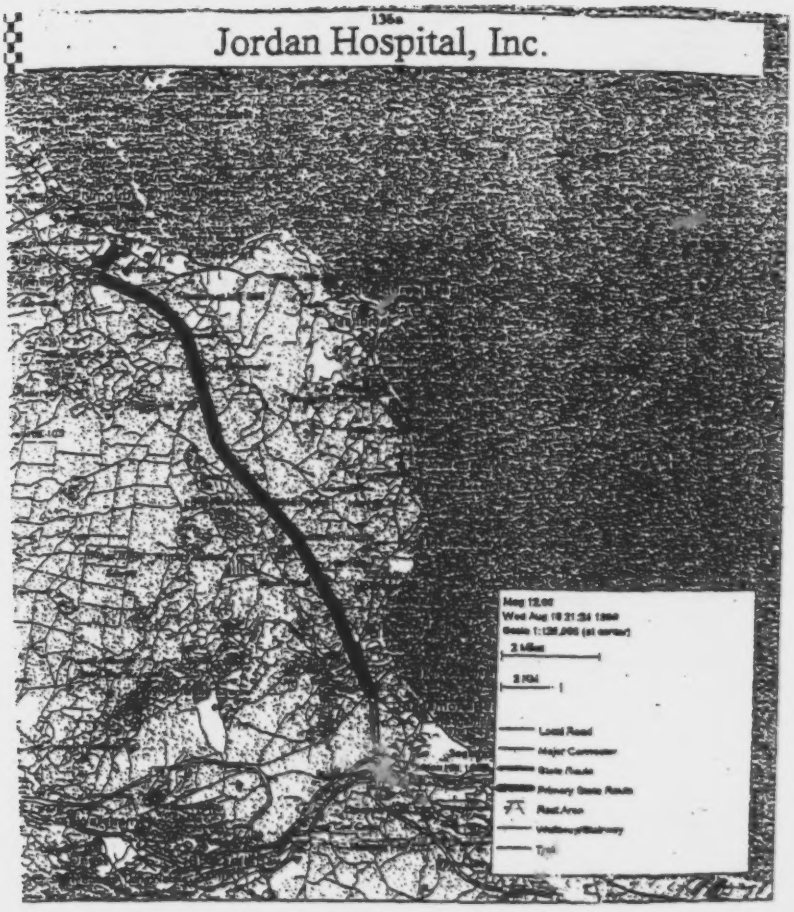
Street Atlas USA® 5.0

		Road	Dir	Near	Exit #	Time	Dist	Mi
		START - Jordan Hospital, MA						
	1	Sandwich St	N			0:00	0.0	0.5
	2	Obery St	S			0:01	0.4	0.3
		STOP - Obery St						
	3	Obery St	SW			0:02	0.7	0.6
	4	South St	S			0:04	1.2	0.1
		STOP - South St						
	5	South St	S			0:05	1.3	0.1
	6	Long Pond Rd	S			0:05	1.4	0.1
		STOP - Long Pond Rd						
	7	Long Pond Rd	W			0:05	1.4	0.0
	8	Local Road	W			0:05	1.4	0.2
		STOP - No Name						
	9	Local Road	W			0:06	1.6	0.0
	10	Long Pond Rd	W			0:06	1.6	0.1
	11	SR 3 (Pilgrims Hwy)	W			0:06	1.6	0.2
		STOP - SR 3(Pilgrims Hwy						
	12	SR 3 (Pilgrims Hwy)	SE	Plymouth 34A		0:06	1.8	11
		FINISH - SR 3						

Total Distance: 13 Mi, Total Time: 0:17

(C) DeLorme. All Rights Reserved.

Jordan Hospital, Inc.



BEST AVAILABLE COPY

CAPE COD HOSPITAL
An Affiliate of Cape Cod Healthcare

March 5, 1999

Mr. Robert Saroutas
Director
Associated Hospital Services of Maine
Audit & Reimbursement - Quincy
1515 Hancock Street Box 30
Quincy, MA 02171

Dear Mr. Saroutas:

I have attached an analysis of revisions that we feel should be made to Cape Cod Hospital's (CCH) FY 1996 Medicare cost report worksheet S-3 parts II and III. Based on our analysis, we feel that the following revisions need to be made to this cost report:

1. Line 1 Column 1: Salaries need to be increased by $2,798,468 to $59,517,825. This increase is to include physician salaries that were reported on worksheet A as "other" expenses in column 2. These physician salaries were originally reported on the cost report as physician fees, however they should have been reported as salary. (Please see attachment A for detail.)

2. Line 1 Column 2: Hours should be increased by 34,574 to 2,579,113. This increase is to include the physician hours corresponding to the salary adjustment above. (Please see attachment A for detail.)

3. Lines 4 & 5 Columns 1 & 2: Physician part A salary should be reported as $647,846, with 6,969 corresponding hours. Physician part B salaries should be reported as $2,130,422, with 27,605 corresponding hours. This adjustment is based on an appeal that we have filed with Medicare on their disallowance of all physician part A cost. Our allocation of physician expense is based on the as filed FY 96 cost report. (Please see attachment A for detail.)

4. Line 8.01 Column 4: Excluded area hours should be increased by 13,605 hours to 127,443. This adjustment is to reflect hours for the NPR re-class of marketing and family care salaries to non-patient. When this re-class was adjusted on the NPR, there was no corresponding hours re-classed to the excluded area. (Please see attachment B for detail.)

5. Line 11 Columns 1 & 2: Home Office wages and related costs were not included on the as-filed FY 1996 cost report nor incorporated by the fiscal intermediary on the NPR. Home Office wages and related costs for FY 1996 were $686,196 with 12,962 of related hours. (Please see attachment C for detail.)

EXHIBIT 3

P.O. Box 542
27 Park Street
[illegible]
508 [illegible]
www.capecodhospital.org

It is important that these revisions be made to the S-3 schedules so that these figures are reflected in the wage index calculation. Please review the attached letter and supporting schedules so that CCH's wage index data is reported correctly. If you have any questions, please call me at (508) 862-7670.

Sincerely,

Maura Kelly
Vice President Finance

cc: Joe Kirkpatrick, Massachusetts Hospital Association
Mark Rich, Feeley & Driscoll, P.C.

Revision of HCFA Wage Index Data

Provider: Cape Cod Hospital

Provider No.: 22-0012

	FY 1996 Worksheet S-3, Pt II & III (RPR)			FY 1996 (Revised) Worksheet S-3, Pt II & III With Revisions			
	Total Adjusted Salaries	Paid Hrs. Related to Salaries	Average Hourly Wage	Total Adjusted Salaries	Paid Hrs. Related to Salaries	Average Hourly Wage	
Salaries							
1 Total Salary	56,719,357	2,544,536	22.29	56,317,825	2,573,113	21.89	(1)
2 Non-Physician Anes. - Part A							
3 Non-Physician Anes. - Part B							
4 Physician Salaries - Part A				647,948	6,986	92.56	3
5 Physician Salaries - Part B	2,548,109	37,741	67.48	2,150,522	27,806	77.31	3
6 Interns & Residents (Approved)							
7 Home Office Personnel							
8 SNF							
8.01 Excluded Area Salaries	2,758,138	113,836	24.23	2,758,138	127,443	21.64	4
Other Wages & Related Costs							
9 Contract Labor	79,480	1,793	44.32	79,480	1,795	44.28	
10 Contract Labor: Phys Part A							
11 Home Office Salaries & Wage Related Costs				866,196	12,662	51.48	3
12 Home Office Phys. Part A							
Wage-Related Costs							
13 Wage-related costs (CORE)	14,531,226			15,038,160			
14 Wage-related costs (Other)							
15 Excluded Areas	1,440,829			1,440,929			
16 Non-Phys Anes. Part A							
17 Non-Phys Anes. Part B				-			
18 Physician Part A							
19 Physician Part B	536,527			537,883			
20 Interns & Residents (Approved)							

	FY 1996 Worksheet S-3, Pt II & III (RPR)			FY 1996 Worksheet S-3, Pt II & III With Revisions		
	Total Adjusted Salaries	Paid Hrs. Related to Salaries	Average Hourly Wage	Total Adjusted Salaries	Paid Hrs. Related to Salaries	Average Hourly Wage
Overhead Costs - Direct Salaries						
21 Employee benefits	696,929	29,087	23.73	690,925	29,087	23.75
22 Administrative and general	6,393,399	271,839	23.52	6,393,899	271,839	23.52
23 Maintenance and repairs	488,288	21,911	22.29	488,288	21,911	22.29
24 Operation of plant	1,848,877	82,383	19.99	1,848,877	82,383	19.99
25 Laundry and linen service	104,080	5,613	18.54	104,080	5,913	18.54
26 Housekeeping	1,388,239	98,735	13.79	1,388,239	98,735	13.79
27 Dietary	2,133,675	128,386	16.98	2,133,675	128,385	16.98
28 Cafeteria						
29 Maintenance of personnel						
30 Nursing administration	782,087	33,531	23.62	782,081	33,531	23.62
31 Central service and supply	1,381,386	73,461	18.88	1,381,386	73,461	18.58
32 Pharmacy	623,114	22,469	25.38	623,114	22,469	25.38
33 Medical records and medical library	1,488,882	85,348	17.48	1,488,882	83,348	17.48
34 Social service	1,204,508	47,589	25.17	1,204,586	47,589	25.17
35 Other general service						

Revision of HCFA Wage Index Data
Provider: Cape Cod Hospital
Provider No.: 22-0012

140a

	FY 1996 Worksheet S-3, Pt II & III (HCFA)			FY 1996 (Revised) Worksheet S-3, Pt II & III With Reclassi		
	Total Adjusted Salaries	Paid Hrs. Related to Salaries	Average Hourly Wage	Total Adjusted Salaries	Paid Hrs. Related to Salaries	Average Hourly Wage
PART III - Hospital Wage Index Summary						
1 Hos salaries	64,173,428	2,908,736	21.91	57,367,293	2,591,308	22.48
2 Excluded area salaries	2,758,135	113,838	24.22	2,758,135	127,443	21.64
3 Subtotal salaries	51,415,113	2,392,898	21.49	54,609,088	2,434,086	22.43
4 Subtotal other wages and related costs	78,463	1,783	44.02	748,659	14,758	50.54
5 Subtotal wage-related costs	14,931,228		N/A	15,036,166		N/A
6 Total	66,425,804	2,394,783	27.74	70,384,827	2,458,839	28.62
7 Hot salaries	64,173,248	2,908,736	21.91	57,367,293	2,591,308	22.48
8 Excluded area salaries	2,758,135	113,838	24.22	2,758,135	127,443	21.64
9 Subtotal salaries	51,415,113	2,392,898	21.49	54,609,088	2,434,086	22.43
10 Subtotal other wages and related costs	78,463	1,783	44.02	748,659	14,758	50.54
11 Subtotal wage-related costs	14,931,228		N/A	14,931,228		N/A
12 Total	66,425,804	2,394,783	27.74	70,348,884	2,458,839	28.62
13 Total overhead costs	18,454,911	902,448	20.38	18,454,911	906,448	20.38

Cape Cod Hospital
FY96 Wage Index Adjustments
Physician Part A & B Salaries

Line	Dept	ROC	Description	Hours	Salary	Part A %	Part A Hours	Part A Salary	Part B %	Part B Hours	Part B Salary
5	8916	380	Employee Health	111	5,525	100%	111	5,525	0%	0	0
6	8913	380	Medical Staff	1,872	211,053	100%	1,872	211,053	0%	0	0
35	8905	380	House Physician	480	28,104	100%	480	28,104	0%	0	0
42	8914	380	Radiation Therapy	8,320	807,754	35%	2,912	282,714	65%	5,408	525,040
60	8917	380	Obs	2,072	192,621	0%	0	0	100%	2,072	192,621
60	8918	380	Oncology	8,320	700,027	11%	924	77,781	89%	7,396	622,246
60	8925	380	PCI	10,695	690,487	5%	535	34,524	95%	10,160	655,963
60	8926	380	Const	2,704	162,897	5%	135	8,165	95%	2,569	154,732
				34,574	2,798,468		6,969	647,866		27,605	2,150,623

Part A/Part B Allocations are based on the FY 1996 as filed worksheet A-8-2 worksheet allocations. The salary figures reported on this worksheet were originally reported as "other" expenses on worksheet A column 2, however should be reported in column 1 as salaries.

1418

Attachment A

Cape Cod Hospital
FY96 Wage Index Adjustments
Excluded Area Salaries & Hours

A Line	Dept	Description	Hours	Salary	Percent Excluded	Excluded Hours	Excluded Salary
31	6600	Adult Psych.	68,108	1,430,346	100%	68,108	1,430,346
31	6650	Pedi Psych	43,593	962,199	100%	43,593	962,199
100.03	6965	Family Care	13,070	311,807	100%	13,070	311,807
6	8613	Community Affairs	4,870	76,296	44%	2,143	33,571
6	8785	PR / Marketing	1,200	45,865	44%	529	20,212
		Revised Excluded Area Hours and Salary				127,443	2,758,135
		Excluded Area Hours and Salary on NPR				113,838	2,758,135
						13,605	

Note: NPR reported a change in excluded area salaries, however no corresponding hours were allocated to the excluded area.

1426

Attachment B

CAPE COD HEALTHCARE
Working together for a healthier Cape Cod

Robert J. Coughlin
Director of Managed Care

March 23, 1999

Mr. Robert Baroutas
Director
Associated Hospital Services of Maine
1515 Hancock Street
PO Box 30
Quincy, MA 02171

Dear Mr. Baroutas:

By way of a letter dated March 4, 1999 (copy enclosed) we notified you that Cape Cod Hospital (CCH) had recently identified several changes that needed to be made to correct CCH's 1996 cost report worksheet S-3, parts II and III.

On further review of the trend analysis we completed as part of our overall review for the 1996 cost report, we have now determined that similar corrections are necessary for those same worksheets, for fiscal years 1994, 1995 and 1997. These changes are necessary to correct errors in the cost report CCH filed in each of those years.

The changes, by year, are described in detail below:

1997 Cost Report

- Line 1 Column 1: Salaries need to be increased by $2,767,700 to $60,687,639. This increase is to include physician salaries that were reported on worksheet A as "other" expenses in column 1.
- Line 1 Column 2: Hours should be increased by 39,725 to 2,491,483. This increase is to include the physician hours (33,886).
- Lines 4 & 5 Columns 1 & 4: Physician part A salary should be reported as $456,517, with 6,380 corresponding hours. Physician part B salaries should be reported as $2,311,183, with 27,506 corresponding hours. Our allocation of physician expense is based on the as filed FY97 cost report worksheet A-8-2.

- Line 8.01 Columns 1 & 4: Excluded area hours were not reported on the as-filed cost report. These hours should be reported as 115,700. In addition, we re-classed $20,530 of marketing expense to non-patient based on prior year audit adjustments

- Line 9 Columns 1 & 4: This line should be left blank. This line is used to report contract labor costs for management services and direct patient care that is not already included in line 1.

- Line 11 Columns 1 & 4: Home Office wages and related costs were not included on the as-filed FY 1997 cost report. Home Office wages and related costs for FY 1997 were $1,301,280, with 23,432 of related hours.

- Lines 13 & 15 Columns 1: Wage related costs have been adjusted to exclude the fringe benefits related to the excluded areas. Line 13 should be $16,923,962 and line 15, $1442,679.

1995 Cost Report

- Line 1 Column 1: Salaries should be decreased by $4,300,233 to $58,911,207. This decrease in salaries is to exclude physician fees that were originally submitted as salaries on worksheet A.

- Line 1 Column 2: Hours should be increased by 417,851 to 2,656,656. The as-filed report used the "worked hours" rather than "paid hours".

- Lines 4 & 5 Columns 1 & 4: Physician part A salary should be reported as $515,836, with 5,545 corresponding hours. Physician part B salaries should be reported as $2,084,726, with 23,799 corresponding hours. Our allocation of physician expense is based on the audited FY95 cost report worksheet A-8-2.

- Line 8.01 Columns 1 & 4: Excluded area salaries have been adjusted to exclude psychiatric physician fees which were originally reported in worksheet A. Also, expense and hours for Project Care and Marketing have been re-classed to non-patient based on audit entries. The corrected amounts are as follows:

	Column 1	Column 2
Line 8.01	$2,794,397	140464

- Line 9 Column 1 & 4: This line should be left blank. This line is used to report contract labor costs for management services and direct patient care that is not already included in line 1.

- Line 11 Columns 1 & 4: Home Office wages and related costs were not included on the as-filed FY 1995 cost report. Home Office wages and related costs for FY 1995 were $655,643, with 9,155 of related hours.

- Lines 13 & 14 Columns 1: Wage related costs have been adjusted to exclude the fringe benefits related to the excluded areas.

1994 Cost Report

- Line 1, Column 1: Total salaries should be $55,564,908. The revised figure excludes physician fees.

- Line 1, Column 2: Total hours should be increased to 2,569,018 to reflect physician hours that were erroneously excluded.

- Lines 4& 5, Columns 1 & 2: Amounts were added to recognize physician salaries and hours for both Part A and Part B. The following table provides the corrected figures:

	Column 1	Column 2
Line 4	$529,578	6196
Line 5	$2,007,481	15228

- Line 8.01, Columns 1&2: Excluded area salaries (i.e. psychiatry, marketing, and community relations and project care) required adjustment. The table provides the corrected figures:

	Column1	Column 2
Line 8.01	$2,830,597	122744

- Line 9, Columns 1&2: The costs and hours previously assigned to this line have already been included in line 1. This line should be zero.

- Line 11, Columns 1& 2: Home office salaries and hours were added. The report was not required until after the 1994 report was filed. Revised salary costs and hours are as follows:

	Column 1	Column 2
Line11	$502,999	7317

> Line 13, Column 1: Wage related expenses (i.e. fringe benefits) were adjusted to reflect the addition of fringes for the excluded area and the physician Part B portion of salaries, as noted above. The corrected amount is $12,856,122.

Please feel free to contact me at the above number with any questions about these changes.

Sincerely,

Robert J. Coughlin
Director of Managed Care

Department of Health and Human Services
Health Care Financing Administration

Re: Request for Amendment of Administrator's Decision in the Case of Jordan Hospital Inc., MGCRB Case No. 98C0583

The Hospital's request to amend does not meet the criteria set forth for amending Administrator decisions under 42 CFR 412.278(g)(1). Therefore, the Administrator, Health Care Financing Administration, hereby denies the Hospital's request to amend the decision issued in this case.

Date: 1/12/99

Kathleen M. King
Executive Associate Administrator
Health Care Financing Administration

EXHIBIT F

Supreme Court, U.S.
FILED

JUN 12 2002

OFFICE OF THE CLERK

(3)

No. 01-1495

In the Supreme Court of the United States

JORDAN HOSPITAL, INC., PETITIONER

v.

TOMMY G. THOMPSON, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

BARBARA C. BIDDLE
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

11 pg

QUESTION PRESENTED

Whether the court of appeals erred in affirming the dismissal of petitioner's complaint because it did not allege a colorable due process claim.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Painter v. *Shalala*, 97 F.3d 1351 (10th Cir. 1996)	6
Steel Co. v. *Citizens for a Better Env't*, 523 U.S. 83 (1998)	4

Statutes, regulations and rule:

Medicare Act, Tit. XVIII, 42 U.S.C. 1395 *et seq.*	1
42 U.S.C. 1395ww(d) (1994 & Supp. V 1999)	2
42 U.S.C. 1395ww(d)(10)	2
42 U.S.C. 1395ww(d)(10)(C)(ii) (Supp. V 1999)	2
42 U.S.C. 1395ww(d)(10)(C)(iii)(II)	2, 3, 4, 5, 6
28 U.S.C. 1331	3
42 C.F.R. 412.230-412.280	2
Fed. R. Civ. P. 12(b)(6)	4, 5

In the Supreme Court of the United States

No. 01-1495

JORDAN HOSPITAL, INC., PETITIONER

v.

TOMMY G. THOMPSON, SECRETARY
OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 276 F.3d 72. The opinion of the district court (Pet. App. 14a-19a) in unreported.

JURISDICTION

The judgment of the court of appeals was entered January 10, 2002. The petition for a writ of certiorari was filed on April 10, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Medicare Act, Tit. XVIII, 42 U.S.C. 1395 *et seq.*, provides health insurance for the nation's aged and

disabled. Hospitals that choose to participate in the Program are reimbursed for medical services they provide, limited to rates established in advance under the Prospective Payment System (PPS). Under the PPS, payment levels for each diagnostic related group are determined on the basis of the standardized rate and the wage index, which are based on the hospital's geographic location. 42 U.S.C. 1395ww(d).

Congress recognized that certain hospitals pay higher wages, comparable to those prevailing in adjacent wage index areas, in order to attract qualified employees. Congress accordingly directed the Secretary of Health and Human Services to allow hospitals, on an annual basis, to apply for reclassification for wage index purposes to adjacent wage index areas. 42 U.S.C. 1395ww(d)(10). A hospital qualifies for reclassification if its average hourly wage (AHW) is at least 108% of the AHW of hospitals in the area in which it is actually located, and at least 84% of the AHW of the hospitals in the area to which it seeks reclassification. 42 C.F.R. 412.230-412.280.

A hospital seeking reclassification for a fiscal year is required to submit its application to the Medicare Geographic Classification Review Board (Board) in the Department of Health and Human Services "not later than the first day of the 13-month period ending on September 30 of the preceding fiscal year." 42 U.S.C. 1395ww(d)(10)(C)(ii). If dissatisfied with the Board's decision, the hospital may seek administrative review by the Secretary, whose final decision "shall not be subject to judicial review." 42 U.S.C. 1395ww(d)(10)(C)(iii)(II).

2. Petitioner is a provider located in Plymouth, Massachusetts. For fiscal years 1998 and 1999, petitioner timely, and successfully, applied to the Board for

reclassification, for wage index purposes, to the Cape Cod, Massachusetts, Metropolitan Statistical Area. The statutory deadline for an application for reclassification for fiscal year 2000 was September 1, 1998. Petitioner did not file a timely application for reclassification for fiscal year 2000, however, because the hourly wage rate data published in the *Federal Register* indicated that petitioner would not have qualified. Those wage data were inaccurate because a participating hospital in the Cape Cod, Massachusetts, Metropolitan Statistical Area, the Cape Cod Hospital, had submitted erroneous wage data to the Health Care Finance Administration (HCFA). Pet. App. 2a-5a.[1]

On August 17, 1999, petitioner filed an untimely application for reclassification. Pet. App. 58a. The Board dismissed the application. *Id.* at 71a. HCFA affirmed the dismissal. *Id.* at 111a.

3. Petitioner thereafter brought the instant lawsuit, invoking the district court's federal question jurisdiction under 28 U.S.C. 1331. Pet. App. 46a. Petitioner alleged, inter alia, that HHS's "general policies and procedures for geographic reclassification determinations related to wage data" violated its due process rights. *Id.* at 54a. Petitioner sought declaratory and injunctive relief that would require the Board to reopen the proceedings and reconsider petitioner's reclassification application for fiscal year 2000. *Id.* at 55a-56a.

The district court granted the government's motion to dismiss, holding that the relief sought by petitioner "falls within the statutory ban on judicial review" under 42 U.S.C. 1395ww(d)(10)(C)(iii)(II). Pet. App. 19a.

---

[1] HCFA has been renamed the Centers for Medicare and Medicaid Services. In keeping with the court of appeals' opinion and the petition, we continue to refer to HCFA in this brief.

4. The court of appeals affirmed. Pet. App. 1a-13a. The court held that Section 1395ww(d)(10)(C)(iii)(II) precluded petitioner's challenge to the agency's dismissal of its reclassification application. *Id.* at 8a. The court also rejected petitioner's attempt to avoid the statutory preclusion of judicial review by raising a constitutional challenge to HCFA's publication of erroneous information. The court concluded that petitioner's due process claim was not colorable and for that reason could not defeat the preclusion of judicial review under Section 1395ww(d)(10)(C)(iii)(II). *Ibid.* The court found that "HCFA's regulatory scheme provides hospitals with a meaningful opportunity to be heard on reclassification, and accords them sufficient procedural protections. *Id.* at 9a.

ARGUMENT

1. The Secretary's decision denying a reclassification application "shall be final and shall not be subject to judicial review." 42 U.S.C. 1395ww(d)(10)(C)(iii)(II). The court of appeals accepted the proposition that Section 1395ww(d)(10)(C)(iii)(II) does not foreclose "colorable" constitutional claims but held that petitioner's claim was not colorable. Pet. App. 8a-9a. Petitioner urges (Pet. 8-16) the Court to grant certiorari because, in considering whether petitioner's claim was colorable, the court of appeals measured the sufficiency of petitioner's allegations under the failure-to-state-a-claim standard of Rule 12(b)(6) of the Federal Rules of Civil Procedure when it should have considered whether the claim was "so insubstantial, implausible, * * * or otherwise completely devoid of merit as to not invoke a federal controversy." See Pet. App. 9a (quoting *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998)).

That contention lacks merit. The court of appeals nowhere indicated that it was reviewing the sufficiency of petitioner's complaint under Rule 12(b)(6), and petitioner offers no basis for inferring any appreciable difference between an inquiry whether a claim is "colorable" and an inquiry whether a claim is "insubstantial," "implausible," or "completely devoid of merit." Indeed, the court of appeals can hardly be faulted for using the particular terminology of "colorable," since petitioner argued to the court of appeals that its complaint was not subject to Section 1395ww(d)(10)(C)(iii)(II) because the complaint raised "a *colorable* constitutional claim." Pet. C.A. Br. 34 (emphasis added); accord *id.* at 35 ("A colorable constitutional claim exists where the plaintiff alleges a violation of constitutional rights."); see also Pet. C.A. Reply Br. 10 n.6 ("[T]he standard applied [under Federal Rule of Civil Procedure 12(b)(6)] is the same as that used in a motion filed under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction.").

2. In any event, petitioner's due process argument is not sufficiently plausible, under any test, to survive dismissal. Petitioner has no property interest in any particular level of prospective payments offered under the Medicare program. Although a hospital may have a judicially protected interest in receiving payments as set forth in the schedules published by HCFA, "there is nothing in the Medicare Act which would have led a reasonable [provider] to believe [that it] might be entitled to a greater payment * * * than was outlined in the Secretary's fee schedule. Nor is there anything in the Medicare Act that would have led a reasonable [provider] to believe [the fee schedule element] for a given year would be recalculated at a later date to correct for errors * * * or that * * * payments

would be recalculated and supplemented if necessary." *Painter* v. *Shalala*, 97 F.3d 1351, 1358 (10th Cir. 1996).

Moreover, the court of appeals correctly found that "HCFA's publication of erroneous data, while unfortunate, did not deprive [petitioner] of its rights." Pet. App. 9a. As the court explained, "HCFA takes significant steps to insure that the wage data obtained from hospitals subject to PPS are reasonably accurate. [Petitioner] could not realistically have assumed that the wage index information would always be accurate, and that if an error were found, it would be remedied in time to permit a reclassification request." *Id.* At 9a-10a (citation omitted). Further review of that holding, which does not conflict with any other decision, does not warrant this Court's review.[2]

---

[2] The questions presented also set forth issues with respect to whether Section 1395ww(d)(10)(C)(iii)(II) permits equitable tolling or permits judicial review of a dismissal of a reclassification application that was not based on the merits of the application. See Pet. i (questions 3 and 4). The body of the petition, however, fails to develop any argument on those questions or otherwise present a basis for further review by this Court. In any event, the court of appeals properly rejected petitioner's arguments because they would defeat the fundamental purpose of Section 1395ww(d)(10)(C)(iii)(II) to permit the agency to publish final payment rates in a timely manner. See Pet. App. 8a, 13a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
BARBARA C. BIDDLE
Attorney

JUNE 2002